Case Number: 3320269/2019 V

EMPLOYMENT TRIBUNALS

Claimant | **Respondents**

Mr R Moss **v** **1. Blackberry UK Ltd**
2. Mr S Dhaliwal

Heard at: Watford **On**: 4 December 2020

Before: Employment Judge R Lewis

Appearances

For the Claimant: In person
For the Respondents: Mr A Rozycki, counsel (R1)
Ms M Cornaglia, counsel (2)

RESERVED JUDGMENT

1. The claimant was at the material time not a person with disability in accordance with s.6 Equality Act 2010, and his claims of direct disability discrimination are struck out.

REASONS

1. At a telephone hearing on 17 April 2020 Employment Judge Gumbiti-Zimuto listed this hearing to determine whether the claimant was a person with disability. His order was sent to the parties on 4 May 2020.

2. In accordance with the Judge's orders, the claimant had produced an impact statement, and a selection of medical notes, letters and records. The representatives for each respondent had produced written submissions.

3. The hearing was converted to be conducted by video, and I was grateful to the parties for their co-operation in that regard, including presentation of the documents for today.

4. I was provided with pdf bundles of some 300 pages, of which the third segment, medical material, was the most useful.

5. I adjourned for reading. After the adjournment, I asked the claimant for clarification of a number of points which arose from my reading.

6. I then took the perhaps unusual course of offering counsel the opportunity to seek clarification by questions to the claimant. I did not require him to take the oath, as it did not seem to me that this was in the nature of cross-examination. Mr Rozycki had a few minutes of questions, and Ms Cornaglia no more than two or three points. It is fair to say that the questions of both counsel were clarifying the documents and impact statement produced by the claimant, so that when submissions were made, the approach on behalf of both respondents could be that of taking the claimant's case as presented at its highest.

7. I asked counsel to reverse the usual order, so that submissions were presented first by Mr Rozycki and then Ms Cornaglia. They kindly did so, and their submissions concluded at around 12.25, at which point the tribunal took the lunch break, which was extended to give the claimant the opportunity to finalise his reply. The claimant replied briefly in the early afternoon, after which I reserved judgment.

8. Mr Rozycki raised the question, in conclusion, of a possible application to strike out the claims of victimisation (which are not dependent on s.6 status). The tribunal had no power to hear that, as notice had not been given in accordance with Rules 53 to 56. I suggested in reply what seemed to me a common sense approach. If the claimant were found to be covered by s.6, the victimisation claims were a modest corner of a larger case, and it would not be proportionate to list for strike out. If the claimant were not covered by s.6, then the current listing could be reduced to perhaps two days, and it would again be unlikely to be proportionate to list for strike out.

9. The time lapse between when this judgment appeared likely to be sent out, and the listed hearing dates, appeared sufficient to allow for full case preparation in accordance with Judge Gumbiti-Zimuto's order. I have alerted the parties to the possibility of the case proceeding in its entirety by video. At the present stage, there was no objection to this.

The legal framework

10. The case fell to be considered under section 6 and Schedule 1, paragraph 5, of the Equality Act. The first of those states:

> "A person has a disability if she has a physical or mental impairment and the impairment has a substantial and long term adverse effect on her ability to carry out normal day to day activities."

11. In Schedule 1 at paragraph 5(1), the following is stated:

> "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
>
> (a) Measures are being taken to treat or correct it, and

(b) But for that, it would be likely to have that effect.

(2) Measures include in particular medical treatment…"

12. Both counsel referred to the same two authorities, J v DLA Piper UK EAT/0263/09; and Herry v Dudley MBC/UK EAT/0069/19.

13. In the latter case, the EAT said (at paragraphs 30 & 31):

> "30. The term "substantial" is defined by Section 212(1) EQA as meaning "more than minor or trivial". It sets therefore, a fairly low threshold for a Claimant who bears the burden of proving that she is a disabled person for the purposes of the EQA (see Kapadia v London Borough of Lambeth [2000] IRLR 699 CA). Indeed, there is no real dispute between the parties as to the approach that an ET is to adopt in this respect, as was explained by the EAT (Langstaff J presiding) in Adremi v London and South Eastern Railway Ltd [2013] ICR 5912:
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>> "14. It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a tribunal has to consider is on adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a tribunal must necessarily be upon that which a claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other."
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> "31. As the ET acknowledged in its reasoning in the present case, further guidance in the determination of the question of disability is then provided at schedule 1 of the EQA and in the Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability (2011) ("the Guidance"). It has also been made clear in the case law that, where there are two or more impairments, the combined effect must be considered by the ET in determining what the effect is and whether the Claimant is disabled or not."

14. Mr Rozycki relied on Herry as confirming the approach set out at paragraph 42 of DLA Piper as follows:

> "The first point concerns the legitimacy in principle of the kind of distinction made by the Tribunal, as summarised at para. 33 (3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness – or, if you prefer, a mental condition – which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning

of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or – if the jargon may be forgiven – "adverse life events".[5]We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians – it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod and Dr Gill in this case – and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most laypeople, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para. 40 (2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for twelve months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common-sense observation that such reactions are not normally long-lived."

15. Ms Cornaglia took the same approach to the two cases, relying also on paragraph 42 of DLA Piper and paragraph 56 of Herry.

16. When approaching my fact find, I recognise that the claimant, although fluent and articulate, is on unfamiliar territory, and may not have done himself justice in understanding and preparing this case. In particular, despite the language of Judge Gumbiti-Zimuto's order, and the passage of some months since it was made, and the availability of accessible information online, the claimant said that before today he had understood that the focus of the s.6 enquiry was on the effect of the impairment on day to day activities at work.

17. I was referred in some detail to the limited medical notes. I attach weight to these, while understanding that medical notes represent the doctor's professional record of what he or she understands has been said by the patient. The question of what is the period referred to by the doctor who writes "A few months" is not just a matter of interpreting the word "few"; that word is filtered through the question which the doctor put to the patient, and the manner in which the patient has expressed the reply, and the doctor's understanding of the reply – none of which are recorded verbatim.

18. The claimant had prepared a lengthy impact statement. It made little reference to day to day activity. It was a detailed narrative of the index events at work, focussing on the language and behaviour of the second respondent. It set out what the claimant described as impairments and impacts, but stated in general terms, and with reference to events at work.

19. I make the following findings:

19.1 The claimant was born in 1961. He worked for the first respondent in sales from August 2017 until 9 May 2019, when he was dismissed for performance-related reasons which the claimant contests. The second respondent was his line manager apart from a period of over two months when he (the second respondent) was on sick leave. In the ET1 the claimant complained that 'intense pressure and management scrutiny' during the first third of 2018 led to a diagnosis of anxiety disorder in April 2018. The first respondent pleaded that it had issued the second respondent with a final written warning in relation to his management and communication style with the claimant.

19.2 The claimant has a family history of high blood cholesterol, but no other relevant medical history before late April 2018.

19.3 The claimant was seen by his GP on 27 April 2018 (3/24/25). The note reads, 'Problem Stress at work (first).' I take the word 'first' to mean what it says, ie that this was the first consultation for this problem. The note reads, 'History Episode of constricting chest discomfort / Last half hour / When v stressed at work .. BP high today.' He was signed off work for two weeks. The Med 3 recorded the diagnosis, 'Uncontrolled blood pressure, stress'.

19.4 The GP saw the claimant again a week later (4 May) for review, and recorded, 'History, Much better this week / Few more episodes of chest pain / Anxiety improved / BP high today'. He was provided with equipment to take his blood pressure at home. I note that the word 'anxiety' appears in the 'History' section and therefore take it to be the claimant's own narrative, not a clinical diagnosis.

19.5 The claimant returned to work on expiry of the first Med 3, on 11 May, and was signed off again almost immediately from 15 May for two weeks. The Med 3 diagnosis was 'stress at work' (3/24). The claimant went back to work after expiry of the Med 3, and was next seen by the GP for review on 27 July.

19.6 The GP recorded a Problem of "essential hypertension" on 27 July 2018. In the course of the summer of 2018 the claimant undertook online CBT, available through the workplace, which he said in evidence had not been of great help, although his GP note reads, 'Has engaged in CBT, feeling v relaxed and no episodes of chest tightness.' The 27 July note indicates that matters were under control, with the claimant declining further intervention, and the note, 'Would like to observe for time being.'

19.7 The next consultation was on 14 September. The note reads 'concerned about his BP – states his home readings are higher now but feels this is related to his anxiety and stress at work ..' The note indicates a number of symptoms which, in reply to the GP's questions, the claimant said he did not experience (eg dizziness or chest pain). The claimant was given medication for blood pressure,

which he states he continues to take. My understanding is that that will remain a permanent prescription.

19.8 There was considerable discussion at this hearing of the next GP record of 20 December 2018. It recorded, 'Problem Anxiety NOS (New)', ie therefore as the first consultation in relation to anxiety (3/23). I understand 'NOS' to mean 'Not Otherwise Specified,' and to refer to the absence of specific categorisation or causation. The note records, 'History Has been getting symptoms for a few months, related to work stress, starting to affect mood.' The claimant asked for a referral for one to one support.

19.9 The claimant was not signed off work. On 27 December the GP referred the claimant to a specialist private psychologist. The referral letter (27 December) is important. It stated (3/29): "I would be very grateful for your help with this 57 year old gentleman who has been experiencing anxiety for quite some months. This is in part related to work stresses." The GP added that the history given by the claimant was "anxiety symptoms are gradually worsening and this is now also starting to affect his mood. He is very keen to try and manage this in more of effective manner (*sic*). Mr Moss has hypertension and hypocholesterolaemia but is otherwise normally fit and well."

19.10 The claimant was seen by a psychotherapist, Dr Bergson, for assessment on 9 January 2019, and then over five sessions on 18 and 24 January, 11 and 18 February, and 8 April. The claimant spoke in tribunal highly of the help which the therapy had given him, and accepted the accuracy and reliability of Dr Bergson's notes.

19.11 The claimant was next seen by the GP on 28 January 2019. The Problem was recorded as Anxiety NOS, and the history recorded, 'Work related / Seeing therapist / Weekends ruined, sleep poor .. Feels trapped / Not keen on medication.' He was signed off for two weeks.

19.12 In reply to my questions, the claimant explained this as meaning that an anxiety attack on a Thursday or Friday left him unwell over the weekend and therefore unable to enjoy weekend activities and return refreshed to work on a Monday morning.

19.13 I asked the claimant for specific examples of when anxiety had had an effect on day to day activities. After some thought, he added to the existing evidence by stating that he is a season ticket holder at Watford. He could recall two matches when he had planned to use his season ticket but had not felt well enough to attend. After further thought, he mentioned that he occasionally had a meal with friends on a Friday evening, and he could think of occasions when he had not felt well enough to go for a planned event. In light of Dr Bergson's note (see next sub-paragraph) he said that he had not exercised, or gone running, as he had done before.

19.14 The claimant's position improved in the first quarter of 2019. The GP record of 11 February describes him as "much better than previously" and Dr Bergson reports him a week later as describing improvement, and resuming his hobby of running**.** Use of that word implied confirmation of the claimant's assertion above that his hobby of recreational running had been interrupted by his mental state.

19.15 The claimant nevertheless had a period of sick leave between 28 January and 25 February 2019. The absence aided his recovery, and the position improved after that. There is no record of any GP involvement for 54 weeks after 11 February 2019. Dr Bergson discharged the claimant in April. Her final note confirmed that the claimant was managing well and that the only issues he had experienced were work related, writing (as the last sentence of her notes), "Discharge for now as feels can manage hopefully short time left in current employment and feels no anxiety in any other areas. Agreed follow up if ever needed."

19.16 The claimant's employment with the first respondent ended on 9 May 2019. He gave evidence that he had no further anxiety attack until a work related event in his new employment on 25 February 2020. He saw the GP the next day, some 54 weeks since he had previously done so.

Submissions

20. It was common ground that the question for the tribunal was whether the claimant met the s.6 definition on or before 9 May 2019, and that subsequent events could not be relied upon. Counsel therefore asked me to focus on the period from May 2018 onwards.

21. In submission, Mr Rozycki said that it was not accepted on behalf of the firt respondent that either the claimant's anxiety state or high blood pressure or (adopting the correct approach for the tribunal) the combined effect constituted an impairment. He submitted, correctly, that the claimant gave no evidence about the impact on him of hypertension. He submitted that it appeared, no matter how troubling, a consequence of anxiety.

22. Mr Rozycki submitted that what the claimant had described was reaction to an adverse life event, ie the second respondent's management and communication, and, in the absence of a diagnosis of a depressive condition, was not an impairment. He submitted that the claimant's case factually was that anxiety was in his instance entirely reactive to negative events at work. There was no evidence from the claimant of any other trigger or occasion of an anxiety attack. Furthermore, the term anxiety had not been recorded by the GP before December 2018.

23. Turning to whether the effect was substantial, Mr Rozycki pointed out that the claimant's impact statement referred only to an effect on complex work related tasks. He submitted that the effects described at this hearing, which touched on running, football, and socialising with friends, were described at

this hearing by the claimant in terms which were sporadic, but which again were all the consequence of anxiety attacks at work, for which the claimant clearly had non-pharmaceutical coping strategies.

24. Mr Rozycki submitted on long term that the claimant suffered from anxiety, on his own case, from some time early in 2018 until early 2019. However, this was difficult to reconcile with the record by the GP of "a few months" on 20 December 2018 (confirmed by the letter of 27 December) and in any event he had plainly recovered by April 2019 as Dr Bergson discharged him. Whatever had happened in his new employment, there was no evidence in early 2019 that a recurrence could well happen.

25. Ms Cornaglia adopted Mr Rozycki's submissions, and cautioned against the loose use of the words anxiety or stress. She added on substantial that the claimant had on at least two occasions been offered medication and refused it, and submitted that the only specific effect on day to day activities quoted by the claimant had been in oral evidence at this hearing, when he had spoken of not going to football matches, and said that he thought that was in the early part of 2019. She pointed out that he had been discharged by Dr Bergson within a matter of weeks thereafter.

26. The claimant in reply said that his anxiety attacks began in January 2018, and although he could manage them, each attack was in effect an escalation of the previous one. Each attack had left him with a greater sense of vulnerability.

27. He submitted that he had taken medication for hypertension, and had therapy for anxiety, which he preferred to medication.

Discussion

28. This was not a straightforward point, in particular in light of the paucity of medical evidence, and the gaps in the claimant's understanding of the focus of this hearing. The tribunal's difficulty was also bound up with loose language and loose terminology. It is often difficult to analyse human experience through the artificiality of the legal process: in this case, a particular difficulty was that the claimant's dismissal provided a cut off date of 9 May 2019. The question for me therefore was whether at that date the adverse effects which I found had lasted a year, or were likely to do so. I therefore attach no weight either to the fact of a similar episode in February 2020; or to the length of the gap between that episode and the previous one.

29. I must take care to conduct an evidence based analysis only, without applying a subjective interpretation of words such as stress and anxiety. I must take care to consider how those words are used in the evidence before me; to note how and when they are used by clinical practitioners; and not to apply excessive weight to the usage which I would apply.

30. I must take care to approach the notes with some common sense realism. Neither the claimant nor his GP can have expected that the probable

conventional question and answer (eg "How long have you felt like this?" "A few months") would be scrutinised two years later in a tribunal. It would be unrealistic to attach an over literal reading to that exchange or to the GP notes.

31. I attach weight in the GP records in particular to the usage of the words stress and anxiety. I approach the point on the basis that the GP has understood that those are medical terms, and has used them correctly in the notes. If a patient presented to the GP complaining of stress, and the GP considered that the appropriate medical term was something different, it is reasonable to infer that he or she would record the patient's usage in the History, but use the correct medical term in notes, or make some allusion to the possibility of a specific diagnosis.

Conclusions

32. I find that the claimant had an impairment. The impairment manifested in or about March 2018 and continued until about March 2019, and was a vulnerability to the pressures of the workplace. I accept the claimant's evidence that he perceived that his responses to workplace pressures escalated.

33. I find that the impairment had a substantial adverse effect on day to day activities. Although sporadic and fluctuating, it interfered with the claimant's ability in leisure time to enjoy hobbies and recreations, take exercise, and socialise with friends. Dr Bergson recorded the claimant as saying that there was no effect on relationships with family. It nevertheless seemed to me significant that the claimant, as something of an afterthought, mentioned that it was his wife who had persuaded him to see the GP in April 2018. I take that as some evidence of change in the claimant's aspect and behaviour. (I comment that it is not unusual for such change to be more clearly perceived by a person other than a claimant).

34. I do not find that the effect was long term or likely to be so. I accept that the claimant has perceived a continuum of pressures generated at work. I do not in that context accept that the second respondent's language and conduct, leading to a final written warning, are to be accepted as 'adverse life event' as Mr Kozycki suggested.

35. While I accept that the claimant perceived, and underwent, a continuum of poor behaviour on the part of the second respondent, I do not follow the claimant in finding that that was a continuum of a medical diagnosis. I attach considerable weight, in the absence of express medical evidence, to the GP's usage of stress in the notes, and the absence of the usage of anxiety. The bundle contained Med 3 sicknotes as follows (3/25); on 27 April 2018 for "uncontrolled blood pressure, stress;" on 15 May for "stress at work"; on 28 January 2019 for "anxiety" and on 11 February 2019 for "anxiety".

36. The language which has been quoted from the referral letter of 27 December appears to me significant, in that it indicates the distinction in the GP's mind between stress and anxiety.

37. I find that at some point in the second half of 2018 the effects upon the claimant developed from stress related reactions to events at work to a medical condition of anxiety, which included a symptom affecting his blood pressure. I attach weight to the chronology of the medical appointments, the time lapses between them, the claimant's refusal of medication, and the language recorded by the GP in April and May 2018 in contrast to that of December 2018. I interpret the phrases "a few months" or "quite some months" used in December 2018 as encompassing loosely the second half of that calendar year, ie June/July onwards.

38. I interpret Dr Bergson's discharge of the claimant as a finding that the effects had ceased. There was no evidence that the claimant disagreed, or wanted the sessions to continue. Dr Bergson's use of the phrase, ' if ever needed' (emphasis added) implies an event which she thought unlikely to happen. I am confident that had she thought there likely to be a recurrence, she would have advised the claimant accordingly.

39. Not without misgivings therefore, because I am making findings on medical borders and uses of language, none of which are clear or sharp, in my judgment the claimant, although at times very unwell, did not at the material time meet the statutory test of disability, and therefore his claims of disability discrimination fail and are dismissed.

40. As the only claim which now proceeds is that of victimisation, the parties should write to the tribunal **within 14 days of the date on which this judgment is sent** with their revised time estimate for that case to be heard.

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Employment Judge R Lewis

Date: …7/1/21…………..

Sent to the parties on: ...1/2/21..

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For the Tribunal Office