



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs T. Toth

**Respondent:** HR GO (Liverpool) Ltd (R1)  
Mayr-Meinhof Packaging UK Ltd (R2)

**HELD AT:** Wrexham (a hybrid hearing) **ON:** 1<sup>st</sup> – 2<sup>nd</sup> February 2021

**BEFORE:** Employment Judge T. Vincent Ryan

## REPRESENTATION:

**Claimant:** Mr Andras Toth (the claimant's husband)

**Respondent:** Mr. E. McFarlane, Consultant (R1)  
Mr. J. Anderson, Counsel (R2)

**Interpreter:** Ms J. Lyndsey (Hungarian/English interpreter)

# RESERVED PRELIMINARY HEARING JUDGMENT

The judgment of the Tribunal is:

1. At the material time (June-July 2019) the claimant was not a disabled person.
2. The claimant's claims of disability discrimination are dismissed.

## REASONS

1. **The Issues:** The issue was whether the claimant was a disabled person at the material time in accordance with the definition of disability in s.6 Equality Act 2010; the claimant relies on the disabling condition of Post-Traumatic Stress Disorder (PTSD) only (and specifically not anxiety and/or depression), where the material time was June 26<sup>th</sup> – 1<sup>st</sup> July 2019 when the claimant attended for a recruitment interview, believed she was to start work on 1<sup>st</sup> July 2019 but was then informed that she had been unsuccessful.

## 2. The Facts:

- 2.1. The claimant is Hungarian and moved to live and work in UK in 2011. She lives with her husband, Andras Toth, and adult son, Adam Toth. She does not speak English although in 2019 she started to attend language classes. In her daily life and social activities she relies upon her husband and/or son for translation and assistance with language. Mr Andras Toth has some effective conversational English language ability, and I understand that Adam Toth is fluent in English. She shops and attends appointments, such as medical ones, with them wherever possible and requires their interpretation assistance, (other than when on occasion a medical practitioner secured the services of an interpreter).
- 2.2. The claimant has a history of diagnosed mild to moderate depression and anxiety. She does not consider that it has a disabling effect and there is no evidence that it does.
- 2.3. In June 2014 the claimant had an incident(s) at work (not while working for either respondent) when she was unable, or disallowed, to visit the toilet when she had an urgent need. She was "humiliated". This happened twice in a short time. The claimant felt that she was subsequently bullied, that everyone was talking about her, and laughing at her; I cannot find as a fact that they were, but I accept that this was the claimant's genuine perception. To date she has not put that "humiliation" "behind her" and "cannot forget" those events and emotions, (the claimant's words).
- 2.4. The claimant sought medical attention for her then low mood and feelings of fear and anxiety that she related to the two incidents referred to above. She was prescribed medication for this set of symptoms related to those incidents but, once feeling better, she did not complete the course. She has however continued on/off with some medication for her mild to moderate depression and anxiety.
- 2.5. The claimant said in evidence that on attendance at her GP's surgery over many months for any matter, whether related to the trigger events above or otherwise, that two different doctors on several occasions said to her that she should go home to Hungary, or that she should get a job. She took these comments as being disparaging and offensive. The claimant does not think that either doctor was suggesting that a visit home or gainful occupation would be helpful to her mood and may alleviate her symptoms. The claimant considers that she was being dismissed and being told, effectively, to go back to where she came from, or get a job and to stop complaining. The notes naturally do not reflect such offensive commentary. Without evidence on the point from either doctor I cannot conclude what was said and how it was intended. The medical notes indicate optimism on the part of the respective doctors at various times, recording that the claimant, or her son, reported improvements and progress with symptoms; where this is evident the claimant is dismissive of the doctors and says they are wrong. I cannot gainsay the medical opinions expressed. I find that where it does not suit the

claimant's case today, she is unreasonably dismissive of her doctors' medical opinions and of them generally.

- 2.6. The claimant's medical records make several references to the claimant having symptoms of work related stress and reactive depression from the Summer of 2014 onwards. There is reference to suspected, or queried, PTSD in that period. She reported suicidal thoughts. The GP notes say that suspected PTSD ended in December 2015 (p150 of the hearing bundle to which all further page references refer unless otherwise stated).
- 2.7. There are several references in the records to the claimant having symptoms of depression and anxiety at various times, and later of her feeling better and no longer being depressed. On numerous dates either the claimant or her son reported to the claimant's doctor that she was not depressed. It is clear that the claimant's doctors were encouraging the claimant to seek employment. The notes do not give much detail of the actual symptoms that led to suspicion of PTSD or how and why the claimant may have substantial difficulty with her day to day activities, or whether PTSD caused any substantial adverse effect save repeating what the claimant said and still says, namely that she cannot leave home without her husband or son.
- 2.8. The claimant was referred to a psychotherapist in relation to suspected PTSD. The psychotherapist's report of 7<sup>th</sup> November 2016 (page 128) confirms that the claimant underwent twenty-three sessions between 23<sup>rd</sup> March 2016 – 26<sup>th</sup> October 2016 and that psychotherapy was "considered a success". It confirms that the claimant reported that her problems had improved, and she knew what she needed to do to maintain her progress. The claimant was discharged at the end of the planned or maximum then permissible 23 sessions, after which "consolidation" was required; further treatment was alluded to if required at a later stage. The report concludes that the claimant's emotional problems had improved but she had residual symptoms of PTSD; it did not go into details.
- 2.9. The claimant did not return to her GP about her PTSD symptoms after December 2015.
- 2.10. The next medical reference to PTSD is in a fit note at page 87 dated 18<sup>th</sup> September 2018. The claimant was said to be unfit for work due to anxiety with depression for 2 months hence. Although certifying unfitness for work the certificate also includes a comment as to something that may benefit the claimant, if available and with an employer's agreement: "needs regular access to toilets. Due to PTSD is unable to work without the support of her husband – so require workplace together". That was what the claimant told her GP. There was no detail as to why, with the conditions certified of anxiety with depression, the claimant needed access to the toilet or why "due to PTSD" she required to work with her husband save she needed his support.

2.11. I note, because the respondents made the point and the claimant confirmed, that the said fit note (of 18<sup>th</sup> September 2019) was obtained after the commencement of ACAS early conciliation in relation to this claim, when making a claim was in her mind. The claimant was in early conciliation in relation to this claim from 13<sup>th</sup> September 2019 – 25<sup>th</sup> September 2019; she presented her claim on 30<sup>th</sup> September 2019. I find that the fit note was obtained by the claimant specifically to use as medical evidence in connection with this claim; the claimant was certified unfit to work and was not responsible to produce such a certificate to any employer, prospective or former, or otherwise; notably it is the only professionally noted reference to PTSD being an active condition since the psychotherapist's report of residual symptoms on 7<sup>th</sup> November 2016 and it repeats what the claimant says is the effect of the condition upon her now in so far as it relates to work (that she is unable to work without her husband's support and requires a joint workplace); there is no medical evidence to the effect that there is a condition preventing the claimant from leaving her home without her husband or son.

2.12. The claimant says that she still has "fears" and she wants to have further psychotherapy; she adduced no evidence to corroborate that anyone other than her actually considers that she is awaiting an appointment (albeit the November 2016 report alludes to the possibility at some stage). She says that she cannot leave home unaccompanied by her husband or son, and that when there is a change to her daily routine that is not planned she becomes nervous and stressed.

### **3. The Law:**

3.1. S6. Equality Act 2010 defines disability. A person (P) has a disability if P has a mental or physical impairment, and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities.

3.2. The Secretary of State issued "Guidance on the definition of disability" in 2011, effective 1<sup>st</sup> May 2011 ("the Guidance"). The definition and Guidance has been referred to in many binding authorities (cases) and the definition has been clarified. For the claimant's sake I will not set out an analysis of the relevant case law but rather the guiding principles of interpretation as they apply. I hope that this is clearer.

3.3. "Impairment" is given its ordinary meaning. There is no need for a specific diagnosis of a recognised illness or medical condition. The effect of any impairment is what matters rather than labels attached to a cause, or attribution. A tribunal is not required to establish the cause of an impairment.

3.4. "Substantial" implies a limitation going beyond the normal differences of ability which may exist among people; a substantial effect is one that is more than minor or trivial.

- 3.5. Where an impairment is subject to treatment or correction, it is treated as having a substantial adverse effect if, but for the treatment or correction, it was likely to have such an effect; this is often referred to as the “deduced effect”.
- 3.6. “Long-term” means 12 months, that is the impairment has lasted 12 months, or it is likely to do so (or in other words it could well happen).
- 3.7. There is no statutory definition of normal day to day activities, an exhaustive list would be impossible to devise. Generally speaking they are “things people do on a regular or daily basis”. Examples are given in the Guidance but the phrase should be given its ordinary meaning; it is not intended to include activities that are particular to a person or small group of people. This explanation does not exclude work-related activities although specialised activities, including at work, would not generally be considered “normal day to day activities”. The act of going to work itself may well be considered a normal day to day activity, along with going to the shops or out to exercise or socialise (allowing that at this time of COVID19 pandemic-related restrictions daily life is not “normal” and many people are unable to go out to work etc).
- 3.8. An impairment may not prevent someone from carrying out an activity but it may still have a substantial adverse effect on how an activity is carried out.
- 3.9. The material time to adjudge whether a person meets the statutory definition of a disabled person is the time of the alleged discrimination. Where effects fluctuate an impairment is treated as continuing if it is likely to recur.

#### **4. Application of law to facts:**

- 4.1. The claimant’s records show that the claimant’s GPs suspected, and her psychotherapist treated what was taken to be, PTSD resulting from the claimant’s “humiliations” in 2014; she was anxious, fearful and lost confidence suffering low mood that temporarily rendered her unfit to work and prevented her from leaving home, or from leaving home unaccompanied by her husband or son. By December 2015 her GPs no longer thought that she had those PTSD related symptoms or that they did not adversely affect her daily activities, although she had a depressive disorder until March 2020 (which the claimant says is not disabling and which did not account for her being as dependent as described above). Her psychotherapist attributes to her some residual effects of PTSD in November 2016 but, having considered that the treatment had been successful and the claimant having had as many sessions by that time as she was permitted, she was discharged; she has had no further PTSD-related medical appointments or treatment since then. At the most drawn out estimate the claimant had some PTSD effects as she described them from mid- 2014 until at least the end of 2016. That was long-term.
- 4.2. I accept the claimant’s description of the effect of PTSD (or suspected PTSD, the label is not as significant as the effects) upon her in the second half of 2014 and into 2015, that she felt unable to leave home without her husband

or son, whether for appointments or shopping or to go to work (which she was certified as unfit to do). The effects of PTSD in that period therefore had a substantial adverse effect on her normal day to day activities.

- 4.3. There is no medical evidence to support the claimant's assertion that she was substantially adversely affected by her symptoms and the effects of PTSD, as she described them, after December 2015, and an ordinary reading of the psychotherapist's report would support that view. It is not specific as to "residual symptoms". The fact that it says treatment was successful, and refers to the claimant feeling that her problems had improved, her emotional problems had improved, and she had been discharged (albeit because the maximum number of sessions had been reached) lead me to conclude that the symptoms and effects were more than likely no longer substantial. I consider that this is borne out by the absence of detail as to any continuing issues, or a recommendation for continued or emergency treatment beyond the normal service limit (which I presume must always be possible as a patient can hardly be left high and dry without even a re-referral to the GP). The claimant was in fact discharged.
- 4.4. The particular problem for the claimant at the material time, June - July 2019, is that I was not convinced that she is unable to leave home, to go to work or to go shopping and the like, or that her ability to do so was by that date substantially adversely affected. I believe she may chose not to do so. I fully understand that with her lack of use of the English language she would find social interaction difficult and that too might inform her choice as to whether she does or does not leave home unaccompanied. Nothing she said in evidence however, convinced me that her ability to leave home and to go about her normal day to day activities was substantially adversely affected by PTSD, its effects and symptoms. She was not a convincing witness in that regard.
- 4.5. I accept that the claimant may rarely, if ever, leave home unaccompanied; she may well be dependent on her husband and son in many ways. However, from her answers to questions in cross-examination I gained the impression that she was exaggerating the effects of PTSD as she described them on her ability to perform normal activities. The available medical evidence indicates that she had substantially, if not fully, recovered in 2015 or 2016. She has not received, nor does she say she has needed, treatment since then, although if it was available she says that she would avail of it. It would appear that neither her GP nor psychotherapist is in any concerned hurry to provide it. The self-reported comment in the September 2019 fit note regarding PTSD and its effects is convenient but not sufficient to convince me otherwise; the prevailing condition said to incapacitate the claimant from work for two months from 18<sup>th</sup> September 2019 is "anxiety with depression", which the claimant categorically and repeatedly has said is not disabling. The fit note was obtained for no other reason than this litigation; there is no medical evidence to support that comment about PTSD since November 2016 (and I have explained my understanding of the report of 7<sup>th</sup> November 2016 above). I do not consider that the fit note provides medical corroboration that the claimant is disabled as she says. It effectively confirms that she says that

she is disabled as alleged in this claim. Having heard her evidence under cross-examination I find that she is no longer disabled although she was from June/July 2014 and probably until December 2015, but possibly until late 2016 or even as the residual matters resolved into 2017. There is however a gap between then and September 2019 that is only filled by the claimant's unconvincing oral testimony and a fit note where she provided the same information to the GP that has not convinced me.

- 4.6. I emphasise that where I refer to PTSD my concentration is on the effects of PTSD, as was the case initially in 2014 and as described by the claimant, namely an inability to leave her home unaccompanied by her husband or son. I am not overly concerned about the diagnosis of PTSD itself. The claimant has described what she says was its effect upon her and I accept that for some time she had a mental impairment that was disabling. There was no evidence before me to satisfy me that the claimed impairment was likely to recur.
- 4.7. It cannot be right that a claimant is to be considered a disabled person (for the purposes of litigation) because they tell their GP so, and rely on that to tell a Judge so. I do not believe that the claimant is prevented from leaving home unaccompanied, or that she is substantially adversely affected when leaving home, because of a mental impairment. The claimant's choice as to how she manages her normal day to day activities is a matter for her; I do not judge her preference.
- 4.8. The claimant was not a disabled person as claimed, in June - July 2019.

Employment Judge T.V. Ryan

Date: 12.02.21

JUDGMENT SENT TO THE PARTIES ON 15 February 2021

FOR THE TRIBUNAL OFFICE Mr N Roche