



Case Number: 2202328/2020

THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON CENTRAL
BEFORE: EMPLOYMENT JUDGE ELLIOTT (sitting alone)
BETWEEN:

Ms D Hubert

Claimant

AND

One Call 24 Limited

Respondent

ON: 18 February 2021

Appearances:

For the Claimant: Ms B Venkata, counsel

For the Respondent: Ms R White, counsel

PRELIMINARY HEARING HELD REMOTELY

JUDGMENT

The Judgment of the Tribunal is that the claimant was a disabled person at the material time.

REASONS

1. This decision was given orally on 18 February 2021. Both parties requested written reasons.
2. By a claim form presented on 17 April 2020 the claimant Ms Dinah Hubert brings claims of unfair dismissal, and disability discrimination for failure to make reasonable adjustments and discrimination arising from disability.
3. This hearing was originally listed to take place on Thursday 14 January 2021 but was postponed due to technical difficulties experienced by the claimant. It was re-listed for 21 January 2021 due to the claimant not having a hard copy of her witness statement and had read it briefly the night before on her phone. There were also sound difficulties for the claimant. There is a separate costs application in relation to the further postponement.

The format of this hearing

4. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The tribunal considered it as just and equitable to conduct the hearing in this way during the circumstances of this pandemic and in circumstances where the tribunal building for London Central is currently closed for safety reasons.
5. In accordance with Rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended the substantive hearing on disability that went ahead on 18 February 2021.
6. The parties were able to hear what the tribunal heard and see the witness as seen by the tribunal during her evidence. From a technical perspective, there were no difficulties of any substance on 18 February 2021. The claimant had a camera problem only when judgement was delivered but she could hear the decision as it was given.
7. The participants were told that it was an offence to record the proceedings.

The issue for this preliminary hearing

8. The issue for this hearing was identified by Employment Judge Walker at a case management hearing on 29 September 2020 as being to consider the question of whether the claimant was disabled for the purposes of the Equality Act 2010 at the relevant time when she complains about the respondent's conduct, being from 26 September 2019 to 9 December 2019.
9. The claimant relies on anxiety and depression as amounting to a disability.
10. The full merits hearing is listed for 14-17 June 2021 and the issues for that hearing were identified by Judge Walker at the hearing on 29 September 2020. The letter was sent 6 months after the end of the period the tribunal is asked to consider. There was also a photograph of a receipt from a pet shop which the claimant said was for the purchase of a dog.

Witnesses and documents

11. The tribunal heard evidence from the claimant
12. There was an electronic bundle of 124 pages around 57 of which amounted to copies of the claimant's medical records. The claimant's disability impact statement was also included in the bundle running to 23 paragraphs and 7 pages and a separate amended statement. There was a subsequent amended statement.
13. There was an agreed chronology.
14. The tribunal had written submissions from the claimant to which counsel

spoke and oral submissions only from the respondent. All submissions and any authorities referred to were fully considered whether or not expressly referred to below.

Findings of fact on the disability issue

15. The claimant worked for the respondent from September 2015 until her dismissal on notice with effect from 1 December 2019. The respondent is a recruitment agency supplying providing agency nurses to NHS and private healthcare organisations. The claimant is a registered nurse, she interviewed and appraised care staff for the respondent.
16. The claimant relies on the single condition of anxiety and depression as her disability. She confirmed this at the outset of her evidence.
17. The claimant's evidence was that she first developed anxiety and depression in May 2014 following a relationship break up. She felt low and experienced insomnia and had problems concentrating (bundle page 67). There was nothing prior to 2014 that the claimant wished to rely upon. She saw the GP with mood swings and the GP said she showed symptoms of depression.
18. At this point in 2014 the claimant was prescribed the antidepressant Sertraline. She took antidepressants from 12 May 2014 to 16 October 2014, a period of 5 months. On 4 June 2014 the claimant was also prescribed Zopiclone which is sleep medication. It is not in dispute that she was treated with antidepressants for this five month period from May to October 2014.
19. On 15 February 2016 the claimant saw her GP who recorded that she had problems at work and she was stressed and depressed. The claimant said that an issue at work "*caused a flare up*". The tribunal was told that the work issue was not related to the claimant's employment with the respondent. The claimant saw her GP on 21 March 2016 for "*sig[nificant] anxiety*". She was treated with anti-depressants from 15 February 2016 to 21 March 2016 and took those antidepressants for two months.
20. The claimant was not treated with anti-depressants after this until 3 October 2019. The claimant said that the "*flare up was under control*". The expression "*flare up*" was one used by the claimant and was not a term that appeared in her medical records.
21. There was nothing in the claimant's medical records to show any treatment for anxiety or depression in the calendar years 2017 or 2018.
22. The claimant said that this was because she managed her own symptoms. She relies on three methods that she used to manage her symptoms. These were: (i) the purchase of a dog in October 2017, (ii) self-help techniques, for example she said she read a lot of self-help materials online (statement paragraph 18) and (iii) a course of CBT in 2017.
23. There was nothing in the claimant's medical records to the effect that

- acquiring a pet might help her manage her symptoms and could be regarded as a form of “*treatment*”. The claimant took this step of her own volition and it helped her.
24. The claimant says she completed a course of CBT in 2017. This did not appear in her medical records. It was accepted in submissions that this was “*independent of the GP records*”. I noted that it was the claimant’s pleaded case, at paragraph 12 of the Grounds of Complaint (bundle page 18) that she undertook an online course of CBT at her own initiative. I am therefore unable to find that this was part of any treatment regime prescribed by a medical professional. There was nothing to indicate the clinical credentials of any such online course.
 25. Similarly in terms of reading self-help material online, there was nothing in the claimant’s medical records to point her towards this or to show that it formed part of any treatment regime.
 26. On 25 September 2019 the claimant was sent an email requesting her attendance at a disciplinary hearing for performance issues. The following day, on 26 September 2019, the claimant had a telephone appointment with her GP explaining that she experienced stress at work due to a pending disciplinary (bundle page 75). Her medical note described her condition as a “*stress reaction*” and she did not return to work after that date.
 27. In October 2019 she was again prescribed the sleep medication Zopiclone. The medical practitioner recorded that she had been prescribed Sertraline in the past but felt that her symptoms “*were now different*”. She was less depressed but had more anxiety (page 76). She was not sleeping and was tearful and distressed.
 28. On 14 October 2019 she was prescribed Mirtazapine for low mood and depression. The GP records (bundle page 81) began with “*History: MH review*” and described the claimant as having had a minor episode of reactive depression in October 2019 and as “*Less depressed, more anxiety*” page 76.
 29. On 21 October 2019 the claimant was prescribed Diazepam to help calm her and she was referred for CBT in late 2019. Her GP notes said “*History: much the same no real improvement [sic] but early days lots of anxiety not really depressed*” and “*lots of anxiety describes for example had to get off bus as it made her so anxious*” (bundle page 76).
 30. On 28 October 2019 her GP recorded in her notes that the claimant had “*still not self referred to talking therapies*” (page 77). Her GP said that she was “*currently unfit for work*”. The claimant completed the course of CBT in December 2020 – her witness statement paragraph 22.
 31. The claimant was dismissed by letter dated 31 October 2019 giving a termination date of 1 December 2019.
 32. On 26 November 2019 the claimant’s GP said that she needed a recent

increase in medication (page 78).

33. The period under consideration ends on 9 December 2019.

Matters not in dispute

34. There was no dispute on propositions of law set out in the claimant's Skeleton Argument. The parties agreed that the key issue for the tribunal was whether the claimant's condition was long-term, namely whether it was long-term in that it had lasted for at least 12 months or was likely to last for at least 12 months. The respondent did not dispute that when the claimant had an episode of anxiety/depression it had a substantial effect on her ability to carry out normal day-to-day activities.
35. The respondent also did not take issue with whether the condition was anxiety, depression or a combination of the two. The parties agreed that the task of the tribunal was to consider the effect of the impairment, not the cause. See for example the guidance given in Appendix 1 of the Equality and Human Rights Commission Code of Practice on Employment (2015).

The relevant law

36. Section 6 of the Equality Act provides that a person has a disability if that person has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.
37. The burden of proving disability lies with the claimant.
38. Under section 212(1) of the Equality Act 2010 "substantial" in section 6, means more than minor or trivial.
39. In Schedule 1 of the Equality Act, the effect of an impairment is said to be long-term if: (a) it has lasted for at least 12 months or (b) it is likely to last for at least 12 months. 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 to be treated as continuing to have that effect if that effect is likely to recur.
40. Paragraph 5(1) of Schedule 1 to the Equality Act says:
- 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.*
41. In establishing whether a disability is likely to last at least 12 months or to recur, the word "likely" is to be interpreted as "*it could well happen*" which is a lower standard than a requirement that there be at least a 50% chance of

it occurring, **SCA Packaging Limited v Boyle 2009 D ICR 1056 HL**.
Baroness Hale stated at paragraphs 69 and 70:

There are very good reasons for concluding that, in this case too, Parliament did not intend that “likely” should mean “more likely than not”. We are used, in civil proceedings, to deciding whether or not something has happened in the past “on the balance of probabilities”. We ask ourselves whether it is more likely than not that something happened. We usually have a good deal of evidence to help us decide what went on. Once we have done so the event is treated as a fact: it was probable, therefore it was certain.....

But predictions are very different from findings of past fact. It is not a question of weighing the evidence and deciding whom to believe. It is a question of taking a large number of different predictive factors into account. There are cases, as my noble and learned friend, Lord Rodger of Earlsferry points out, in which the doctors can predict with all too much confidence what will happen to the patient. But in many others, putting numbers on what may happen in the future is a guessing game. Who can say whether something is more than a 50/50 chance?

42. Whether an impairment is likely to last at least 12 months, or its effect is likely to recur, requires the tribunal to make its decision at the time of the relevant discriminatory act or decision - **McDougall v Richmond Adult Community College 2008 ICR 431**.
43. In assessing the likelihood of recurrence, the tribunal should not limit its consideration to the date of dismissal. The EAT in **Parnaby v Leicester City Council EAT/0025/19** held that the tribunal had fallen into error in assuming that because the claimant stress was caused by work it was not likely to recur beyond the date of dismissal.
44. The tribunal takes account of the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011) issued under section 6(5) of the Equality Act.
45. Paragraph B5 of the Guidance dealing with the requirement for the impairment to be substantial and in relation to cumulative effects, gives the following example:

A man with depression experiences a range of symptoms that include a loss of energy and motivation that makes even the simplest of tasks or decisions seem quite difficult. He finds it difficult to get up in the morning, get washed and dressed, and prepare breakfast. He is forgetful and cannot plan ahead. As a result he has often run out of food before he thinks of going shopping again. Household tasks are frequently left undone, or take much longer to complete than normal. Together, the effects amount to the impairment having a substantial adverse effect on carrying out normal day-to-day activities.

46. Paragraph B12 in relation to the effects of treatment says:

The Act provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. The practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question

47. Treatment can include counselling with a qualified professional: ***Kapadia v London Borough of Lambeth 2000 IRLR 699, CA***. In that case there was medical evidence from two medical experts that there was an underlying disability which was concealed by the medical treatment. In that case there was a GP referral for counselling. The EAT in that case held that counselling sessions with a consultant clinical psychologist constituted “medical treatment” within the meaning of paragraph 6 of Schedule 1 to the Equality Act.

48. Paragraph B14 gives a further example in relation to the effects of treatment:

A person with long-term depression is being treated by counselling. The effect of the treatment is to enable the person to undertake normal day-to-day activities, like shopping and going to work. If the effect of the treatment is disregarded, the person’s impairment would have a substantial adverse effect on his ability to carry out normal day-to-day activities.

49. Paragraph C6 of the Guidance dealing with the requirement for the impairment to be long term and in relation to recurring and fluctuating effects, says:

For example, a person with rheumatoid arthritis may experience substantial adverse effects for a few weeks after the first occurrence and then have a period of remission. See also example at paragraph B11. If the substantial adverse effects are likely to recur, they are to be treated as if they were continuing. If the effects are likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term. Other impairments with effects which can recur beyond 12 months, or where effects can be sporadic, include Menière’s Disease and epilepsy as well as mental health conditions such as schizophrenia, bipolar affective disorder, and certain types of depression, though this is not an exhaustive list. Some impairments with recurring or fluctuating effects may be less obvious in their impact on the individual concerned than is the case with other impairments where the effects are more constant.

50. Two examples were given at paragraph C6 as follows:

A young man has bipolar affective disorder, a recurring form of depression. The first episode occurred in months one and two of a 13-month period. The second episode took place in month 13. This man will satisfy the requirements of the definition in respect of the meaning of long-term, because the adverse effects have recurred beyond 12 months after the first occurrence and are therefore treated as having continued for the whole period (in this case, a period of 13 months).

In contrast, a woman has two discrete episodes of depression within a ten-month period. In month one she loses her job and has a period of depression lasting six weeks. In month nine she experiences a bereavement and has a further episode of depression lasting eight weeks. Even though she has experienced two episodes of depression she will not be covered by the Act. This is because, as at this stage the effects of her impairment have not yet lasted more than 12 months after the first occurrence, and there is no evidence that these episodes are part of an underlying condition of depression

which is likely to recur beyond the 12-month period. However, if there was evidence to show that the two episodes did arise from an underlying condition of depression, the effects of which are likely to recur beyond the 12-month period, she would satisfy the long term requirement.

51. At paragraph C2 and example is given in relation to the meaning of long-term:

A man experienced an anxiety disorder. This had a substantial adverse effect on his ability to make social contacts and to visit particular places. The disorder lasted for eight months and then developed into depression, which had the effect that he was no longer able to leave his home or go to work. The depression continued for five months. As the total period over which the adverse effects lasted was in excess of 12 months, the long-term element of the definition of disability was met.

Conclusions

52. The period during which the claimant seeks to establish that she was disabled is from 26 September 2019 to 9 December 2019 being the date upon which she was notified of a disciplinary hearing for performance issues until dismissal, a period of about 10 weeks. The tribunal must of course look at her condition prior to 26 September 2019 to see whether she met the definition of disability under section 6 Equality Act 2010.
53. As stated above, the key issue is whether the claimant's condition was long-term as defined in the Act. It is not in dispute and that the claimant was prescribed antidepressants during three periods namely:
- a. 12 May to 16 October 2014 (5 months)
 - b. 15 February 2016 to 21 March 2016 (1 month)
 - c. 3 October 2019 to 9 December 2019 (2 months)
54. The respondent case and submission was that these were discrete episodes and that there was nothing to show the tribunal that the claimant had an underlying condition. The respondent correctly submits that claimant bears the burden of proof on disability.
55. It was the claimant who used the expression flareups, but as I have stated above, this was not terminology that appeared anywhere in her medical records.
56. What the medical records showed was distinct episodes which required treatment that included antidepressants. They came in response to stressful life events, in May 2014 as a result of a relationship breakup, in February/March 2016 in relation to events at work (not with the respondent) and in September 2019 in response to being invited to a disciplinary. The respondent case was that this was reactive to life events and was not evidence of an underlying medical condition.
57. In terms of the effects of treatment, the claimant relied upon three matters namely the purchase of the dog, undergoing a course of CBT in 2017 which I have found she did online of her own volition and reading self-help

- materials. These are all steps which the claimant commendably undertook at her own initiative. Whilst the claimant was referred by her GP for CBT in 2019, I am unable to find her online course in 2017 was part of any clinical treatment regime.
58. There was no evidence of the claimant undergoing any treatment for anxiety or depression, as prescribed by her GP, from 21 March 2016 to 3 October 2019. I am therefore unable to regard the steps the claimant undertook by herself as “*akin to medical intervention for the purposes of paragraph 5 of Schedule 1 Equality Act*” as the claimant submitted I should. These steps were self-interventions and not medical interventions. I did not doubt that CBT or counselling or the like can amount to medical treatment for the purposes of paragraph 5 but it needs to be medical treatment and not self treatment. As in the case of **Kapadia** the counselling was as a result of a referral from the GP.
 59. In relation to whether the condition was long-term, I went on to consider whether, when the claimant’s impairment ceased to have a substantial adverse effect upon her ability to carry out normal day-to-day activities as was the case in 2017 and 2018 – it should be treated as continuing to have that effect because it was likely to recur. This is a lower standard than a requirement that there should be at least a 50% chance of it occurring. The decision has to be made as at the time of the discriminatory act or decision and in this case 9 December 2019. It requires an element of prediction in December 2019 as to the future for the claimant’s condition.
 60. The question was therefore whether in December 2019, it “*could well happen*” that the effect of the claimant’s impairment would last at least 12 months or would recur. What was the likelihood of recurrence? I took account of the decision of the EAT in **Parnaby** that the likely duration of the claimant’s impairment was not limited by her dismissal. Projecting forward from there, was the condition likely to last at least 12 months, or to recur?
 61. In May 2014 it was a relationship breakup that gave rise to the need for treatment for five months for the impairment relied upon. In February 2016 the claimant required treatment with antidepressants for two months due to problems at work. It was being called to a disciplinary at the end of September 2019 that led to the third episode.
 62. The respondent submits that I should find that the claimant’s case is closer to the second example in paragraph C6 of the Guidance and therefore she does not meet the definition of disabled in section 6 Equality Act. In the first example The first episode occurred in months one and two of a 13-month period. The second episode took place in month 13. The guidance said that this man will satisfy the requirements of the definition because the adverse effects recurred beyond 12 months after the first occurrence and are therefore treated as having continued for the whole period (in this case, a period of 13 months). In the second example there were two discrete episodes of depression which did not go outside one year. There was no evidence in that example that these episodes were part of an underlying condition of depression which was likely

to recur beyond the 12-month period. However, if there was evidence to show that the two episodes did arise from an underlying condition of depression, the effects of which are likely to recur beyond the 12-month period, she would satisfy the long term requirement.

63. In this claimant's situation, there are three episodes. Paragraph C6 above says that if the substantial adverse effects are likely to recur, they are to be treated as if they were continuing. If the effects are likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term. In the second example in paragraph C6 there were two discrete episodes. In this case there are three. If the claimant encounters a stressful life event, then her medical history has shown that the condition is likely to recur. This is not saying that it is at least a 50% chance that it will recur. It is a lower standard than that, according to **SCA Packaging**. If the claimant encountered another stressful and difficult life event it could well happen. I therefore find, based on three occurrences within five years, that the claimant's condition was likely to recur according to the test in **SCA Packaging** and the substantial adverse effect is to be treated as if it was continuing because it was likely to recur.
64. As Baroness Hale said in *SCA Packaging* predictions are very different from findings of past fact. It is not a question of weighing the evidence and deciding who to believe. It is a question of taking a large number of different predictive factors into account. Baroness Hale pointed out that in some cases doctors can predict with confidence what will happen to the patient but in many other cases the future is a guessing game. Based on the claimant's undisputed factual history of depressive episodes in response to stressful life events and the low threshold of the test, I find that her condition was likely to recur in relation to the next stressful life event she encountered. Unfortunately, none of us are immune from the occurrence of stressful life events.
65. As such the claimant meets the test in section 6 and I find that she was disabled at the material time.

Employment Judge Elliott
Date: 19 February 2021

Judgment sent to the parties and entered in the Register on: 22 Feb. 21.
_____ for the Tribunal