Case Number 2300397/2019
Code: V

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr T Ward		Chartered Institute of Internal Auditors

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Croydon **ON** 6th April 2021

EMPLOYMENT JUDGE A Richardson

Representation
For the Claimant: Mr R Johns, Counsel
For the Respondent: Ms G Hirsch, Solicitor

RESERVED JUDGMENT

The judgment of the Tribunal is that

(1) The claimant was disabled by reason of depression/anxiety within the definition of S6 Equality Act 2010 with effect from May 2018.

REASONS

Background

1. The claimant was engaged by the respondent on 9th March 2015 as an application support analyst which entailed him providing technical and administrative support to users of the CTM system. The respondent is a professional association for internal auditors in the UK and Ireland. The claimant was part of the respondent's 'Transformation Project Team' and was expected to manage several of their projects. He remains employed by the respondent although currently on long term sickness absence.

2. The claimant brings claims of disability discrimination under S15, Ss20/21, S27, S19 EqA 2010 and unauthorised deduction from wages and arrears of pay and other payments.

Proceedings and Evidence

3. The proceedings were conducted remotely by CVP. I heard oral testimony from the claimant, Mr K Grimwood, Professional Services Manager; Mr S Thompson, Events Manager; Ms K Reed, Head of Governance and HR; and Ms S Cox, Senior HR Advisor.

4. I was provided with a bundle of documents of 334 pages which contained the pleadings and the claimant's GP medical records along with inter alia evidence of correspondence and the claimant's personnel records.

Findings of fact

5. I make my findings of fact on the basis of the evidence before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have resolved such conflicts of evidence as arose on balance of probabilities. I have taken into account my assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts and documents. My observation of the claimant's evidence was that at times he appeared over cautious in answering questions to avoid saying anything which he believed would undermine his claim. This lack of direct response in cross examination diminished at times his credibility, as it made him appear evasive. However his evidence overall did not lack credibility where it was supported by the GP notes and other witness testimony. My findings of fact relevant to the issues which have been determined are as follows.

Relevant chronology of key facts

6. The claimant commenced his employment with the respondent in 2015. On 9th November 2017 the claimant attended his GP surgery to complain about feeling low over the last few months. The visit had been prompted by a video about depression and its symptoms that the claimant had recently come across and watched online. The video had described exactly the claimant's feelings and he understood only then why he had been feeling so low. He recognised that he had depression.

7. The GP recommended that the claimant try to deal with his symptoms by first contacting the Improving Access to Psychological Therapies programme (IAPT) for an assessment. During his consultation with his GP the claimant took the standard PHQ-9 depression test for which he scored 16. Of the 9 questions, the claimant identified 7 as applying to him most of the time. To the final two questions relating to self harm/suicide and whether people had noticed him moving or speaking slowly or being fidgety or restless, the claimant had responded "*not at all*".

8. Whilst the claimant's GP does not expressly record the word 'depression' in the narrative of his notes, it is clear that the claimant was diagnosed as depressed with a score of 16 on completing the standard PHQ-9 depression test. The claimant had feelings of a lack of enjoyment of life, poor appetite, poor sleep and lack of focus at work. Nearly every day he had felt little interest or joy in doing things; he often felt down, depressed or hopeless. He had difficult sleeping; had little energy nearly every day, more than half the time he had little appetite and had low self esteem nearly every day.

9. The claimant completed an initial screening for counselling with IAPT on 28th November 2017 and was placed on the waiting list for counselling on 14th January 2018. He did not start CBT until 1st May 2018.

10. At the relevant time the claimant was line managed by Mr S Rainbird (Mr Rainbird). I read written evidence from November 2017 that Mr Rainbird was expressing some frustration with the claimant's performance and ability to follow Mr Rainbird's directions and an overall agreed plan for the claimant to meet his work objectives.

11. Following his diagnosis on 9th November 2017 the claimant continued to attend work. He had had 12 days off sick in 2017, the highest of any member of staff. By end of January 2018 the claimant had had a further two days off sick. Outwardly the claimant was sociable and did not have difficulty forming relationships and friendship inside and outside work. His hobby was stand-up comedy and improvision. He shared from time to time video clips of his performances with his work colleagues. The claimant states that he did not perform at any stand up or improvisation gigs after February 2018.

12. In February 2018 Mr Rainbird was recording notes of his meetings with the claimant regarding the claimant's sickness absence and the need for the claimant to maintain focus on his key, agreed priorities. Mr Rainbird expressed

concern about a backlog in the claimant's work and incorrect use of diary - essentially communication issues.

13. In February 2018 and April 2018 there were email exchanges between the Ms Reed and Mr Rainbird about the claimant's sickness record and the need to understand if his sickness was caused by any work issue or whether there was an underlying medical condition.

14. In April 2018 the claimant attended a performance review with Mr Rainbird. The review covered the period 1st April – 30th September 2017 and 1st October 2017 – 31st March 2018. The claimant expressed his concerns that none of his objectives reflect his duties alongside the transformation project despite this being [his] highest priority. He also states *"I have voiced my concerns and asked for training as currently I feel incompetent as I have no formal training with project management; despite this no training has been arranged…… I still do not feel that my input is valued and that my technical expertise and experience is wasted here."*

15. The claimant's personal feed back on his assessment form was overall negative. Mr Rainbird's assessment appeared to be that the claimant had partially met his full year objective assessment on three out of four entries; only one fully year objective assessment was categorised as fully met. The assessment was signed off on 23rd April 2018.

16. In contrast to the 2018 assessment, for the previous year to March 2017 the claimant had four entries of fully achieving the objectives and one of attempted objective but not fully achieved. In the previous year's assessment there is also a positive reference to the claimant wishing to pursue project management training in order to better manage his workload and pursue more ambitious projects within the organisation.

17. On 1st May 2018 the claimant received an email from Mr Rainbird. Mr Rainbird referred to an agreed plan of activities for completion by the claimant but noted that the claimant was not performing at the level expected. He issued a 'verbal warning' regarding the claimant's performance. Mr Rainbird suggested another meeting to re-visit the activities that had been agreed in April. The claimant perceived the verbal warning to be disciplinary action.

18. On 11th June 2018 the claimant informed Ms Reed, that he had been suffering from depression for some time, having been diagnosed by his GP on 9th November 2017.

19. At the claimant's request Mr Rainbird was informed by Ms Reed on 15th June 2018 of the claimant's diagnosis of depression. Ms Reed subsequently commented to the claimant that Mr Rainbird was immediately understanding of the situation and felt that it "*explained a lot*".

20. On 15th June 2018 the claimant attended his GP surgery. The claimant told the GP that he was suffering from low mood, finding it difficult to sleep and that his appetite was poor. He informed his GP that he was undergoing CBT but that he wished to take antidepressants to help manage his anxiety and the impact of the depression he was experiencing as it was significantly impacting his life. The GP prescribed Sertraline at 50mg daily. At a review a month later on 13th July 2018 it was agreed that the claimant would continue with Sertraline at 50mg daily and that he would also continue with CBT.

21. On 22nd June 2018 the claimant had a meeting with Ms Reed to discuss his depression. Ms Reed reassured the claimant that Mr Rainbird would be more sensitive in response to the claimant's depression but the claimant perceived no change in Mr Rainbird.

22. On 13th July 2018 the claimant again visited his GP. Although the medication he was taking helped improve his anxiety, he was still suffering from sleep difficulties. The claimant was taking the train to work every morning; at around this period, he had suicidal thoughts on occasions about jumping in front of the train. The claimant described himself as feeling overwhelmed and fragile.

23. On 16th July 2018 the claimant submitted a formal grievance to the COO Mr J Brown in relation Mr Rainbird's decision not to award the claimant a bonus because he is subject to disciplinary action (namely the verbal warning given on 1st May 2018).

24. On 24th July 2018 Mr Rainbird held a meeting with the claimant to review the communication of progress on the claimant's projects. Following that meeting the claimant left the office and went home because he felt anxious, effectively he had a panic attack. In subsequent emails between Ms Reed and Mr Rainbird it is clear that there was a concern about the claimant's well being.

25. On 31st July 2018 the claimant attended a grievance meeting with Mr Brown at which the PIP was discussed and it was explained to the claimant that that the 'verbal warning' issued by Mr Rainbird was part of the performance

management process and not the disciplinary procedure as the claimant believed. It was described as an informal warning. During the meeting the claimant discussed with Mr Brown his personal issues with depression and anxiety.

26. The claimant received a PIP on 1st August 2018 on the morning following the grievance meeting with Mr Brown.

27. On 7th August 2018 the claimant attended a meeting with Mr Rainbird and Ms Reed to discuss the draft PIP. The claimant found the meeting difficult because he perceived Mr Rainbird to be unsupportive. The claimant left the office and went home because of his anxiety levels.

28. At a meeting with his GP on 9th August 2018 the claimant was diagnosed as having low mood and not otherwise specified anxiety state . The Sertraline prescription was increased to 100mgs daily. The claimant was signed off work from 7 August 2018 until 11 September 2018 because of the impact of his anxiety and because he had started having panic attacks.

29. The claimant visited his GP on 14th August 2018. The diagnosis remained “anxiety state”.

30. On 23rd August 2018 at a review meeting with his GP it was noted in the GP’s records that the claimant found the Sertraline had reduced his level of anxiety. He had been socialising more and spending time with friends. The records show that the claimant was to continue with Sertraline and also with CBT and that he would aim to return to work the following week.

31. On 4th September 2018 the GP records disclosed to his GP that he did not feel ready to return to work and that the thought of having to go back triggered anxiety. At the review meeting with his GP on 11th September the claimant reported that he felt his mood was continuing to improve and that he was due to attend a return to work meeting later that day. The diagnosis remained Anxiety State.

32. At a return to work meeting on 11th September 2018 with Ms Cox, the claimant was provided with a new amended PIP which had been substantially altered from the previous draft of 1st August, with the support from Mr Rainbird being substantially removed. The claimant raised allegations of bullying against Mr Rainbird, confirming that he felt personally harassed by unkind words

/behaviour from Mr Rainbird; there was friction and anger between them, that he was bullied and relationships were strained.

33. On 18th October 2018 the claimant's GP recorded that the claim's eating and drinking were ok, his sleep and energy levels had improved and that he was to continue on Sertraline 100mg daily. At this stage although the claimant did not wish to stop CBT, the therapist is recorded as having indicated that the claimant may not need further follow up and the matter was to be discussed. The GP notes record the claimant/'s diagnosis was "Major: Anxiety State (NOS))E200z) (Ongoing Episode). The claimant was signed unfit for work from 8th October 2018 – 1st November 2018.

34. On 1st November 2018 the claimant's GP recorded in his notes that the claimant had had some anxiety over the last couple of weeks. The diagnosis was Anxiety State and the claimant was certified as not fit for work until 9th December 2018.

35. On 18th December 2018 the claimant's GP notes record that the claimant had stopped CBT but was anxious to be put back in touch with the IAPT programme. The diagnosis remained anxiety; the prescription for Sertraline was increased to 150mgs. The claimant was signed off unfit for work until 6th January 2019.

36. On 2nd February 2019 the claimant filed an ET1.

37. In February 2019 the claimant attended his GP surgery on several occasions. He reported having at times thoughts of self harm. He had had one failed attempt at suicide. He was living with his parents who were supporting him, rather than living in rented accommodation. He was prescribed Zopiclone to assist with sleep on a short term basis. The prescription for Sertraline was increased to 200mgs daily. During February 2019 the claimant's medication included Quetiapine and Zaluron.

38. The claimant continued to attend regular GP appointments in the following months where the diagnosis of anxiety remained the same. The claimant continues to be absent from work because of anxiety and he continues to take medication. He has been absence from work since 27th September 2018.

39. Throughout the period commencing November 2017 for which GP records have been provided the claimant has been variously described by his doctor as communicative, engaged, having good eye contact, friendly, polite, well kempt,

dressed appropriately with good insight into his condition and the need to engage with medication and follow up.

40. Throughout the medical records the claimant complains of poor sleep low, energy levels, poor appetite and reduced socialising. There are periods of improvement for example in energy levels and sleep, socialising, but these are followed by periods of regression. There is no constant or consistent level of improved energy, or improved sleep or socialising throughout the period spanned by the medical records. It is evident that the claimant's condition fluctuated according to medication levels and the intervening events in the claimant's life at work and in personal relationships. Essentially he had good days and bad days.

Submissions

41. I was provided with written submissions by Ms Hirsch and I heard oral submissions from both Counsel of which I have retained a full note. I have read and re-read the submissions of both Counsel and have taken them into account in my deliberations and conclusions.

Relevant law

41. Section 6 of the Equality Act 2010 defines disability as follows:
(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.
…
(6) Schedule 1 (disability: supplementary provision) has effect.
A "substantial" effect is one which is more than "minor" or "trivial" (Equality Act 2010 S.212 (1))

42. The Tribunal is given statutory guidance on the definition of disability for the purposes of the EqA 2010.

43. In **Chacón Navas v Eurest Colectividades SA [2006] IRLR 706** where 'disability' was held to cover those who have a 'limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life'.

44. In assessing whether the disability has a substantial effect, the focus of the tribunal should be on what the Claimant cannot do, not on what they can do: **Aderemi v London and South Eastern Railway Ltd [2013] ICR 59**.

45. Where some level of impairment is established, the question for the tribunal is whether the adverse effects of the impairments were "substantial" (Equality Act 2010 section 6(1)), where "substantial" means more than minor or trivial (section 212(1)).

46. In answering the question of whether the effects are, at a certain point in time "likely to last a year or more" the tribunal must interpret "likely" as meaning "it could well happen": **SCA Packaging Limited v Boyle [2009] ICR 1056**.

47. One aspect of considering whether an impact on day to day activities is "substantial" is to compare the difference in how the individual carries out those activities because of the condition(s) relied on, using his coping mechanisms, albeit without any medication or aids: "If the difference is more than the kind of difference one might expect taking a cross-section of the population, then the effects are substantial."**(Paterson v Commission for Police for the Metropolis [2007] ICR 15522** (paragraph 68)).

48. The question of when a person is disabled for the purpose of the Equality Act 2010 must be assessed at the time of each act complained of. Even if the individual eventually suffers a substantial effect for a year or more, that does not mean that the impairments amounted to a legal disability prior to the expiry of that year. It is necessary to assess whether, at the time of the act (i.e. on the evidence available at that time) the individual had suffered a substantial effect for a year or more, or – on the evidence at that particular time – was more likely than not to suffer substantial effect(s) for a total of a year or more (**Tesco Stores Ltd v Tennant [2020] IRLR 363**). Furthermore, evidence of matters occurring after the claim was filed are not covered by the claim and are therefore not relevant to the assessment.

Conclusions

48. I remind myself that the issues are (i) whether the claimant has a disability and (ii) from what date did he meet the definition of disability under S6 Eqa 2010?.

49. The respondent submits that there was no basis to expect in October 2018 that the claimant's anxiety/depression/suffering was likely to last a year

more. The respondent concedes that by the end of December 2018 the test of disability was met, but not before that.

50. The claimant asserts that he was disabled within the definition under S6 from 9th November 2017. The GP notes of 9th November 2017 show that the claimant had been "*feeling low for last few months*"; he found little pleasure in his life, was eating less, had poor quality of sleep and lacked focus at work. This lack of focus at work is supported by Mr Rainbird's assessment of the claimant and his drive and managerial effort to keep the claimant focussed on his work priorities as evidenced by email correspondence in November 2017 and February 2018.

51. I find that the claimant had a diagnosis of depression on 9th November 2017. Depression/anxiety state are both a mental impairment. He continued working with intermittent short periods of sickness absence related to unrelated matters – food poisoning, an eye problem, flu. The respondent was initially unaware of the diagnosis of depression made on 9th November 2017 or the fact that the claimant was undergoing cognitive behavioural therapy from early May 2018.

52. The respondent suggests that the claimant may well have had a diagnosis of depression on 9th November 2017 but that it was not having a substantial long term adverse effect on him until at the earliest October 2018.

53. Was the effect of the claimant's diagnosis substantial? I have read the evidence supporting the contention that the claimant's performance during November 2017 – March 2018 was not up to Mr Rainbird's expectations.. Mr Rainbird was contemplating performance management in about March 2018. The claimant's trust in Mr Rainbird had clearly deteriorated by June 2018. There is therefore some evidence that the claimant's condition could be affecting his ability to do his work to the satisfaction of his line manager. Once Mr Rainbird became aware of the claimant's diagnosis he said that it "*explained a lot*".

54. I heard the respondent's witnesses' observations of the claimant at work where they described the claimant being in the office and functioning normally, engaging with work colleagues, being smartly dressed, well groomed, and, for the most part, no one noticed anything different about the claimant. At leaving drinks on 29th June 2019 Ms Cox did not observe anything about the claimant's behaviour that stood out or suggested to her that he was unwell. Ms Reed made the same observation – that the claimant was engaging with others at the table.

55. Whilst I note their observations, it is a snap shot of a single short event. It is not the case that a person on medication for depression is necessarily totally uncommunicative or totally unable to engage with others, at least superficially and from time to time. Nor is it the case that a person suffering with depression is inevitably unkempt and does not pay attention to personal hygiene.

56. There were however some signs in their evidence of all not being well at work despite the claimant's superficial appearance of normality at work. Mr Grimwood stated that he remembered the claimant behaving in a negative way in the office although still showing people videos of his gigs, he believed until about June 2018. Mr Grimwood states that he was also surprised by the claimant's impact statement in which Mr Grimwood noticed that the claimant had first visited his GP in November 2017 when Mr Grimwood noticed no changes in the claimant's demeanour until at least May/June 2018. From that date Mr Grimwood noticed that the claimant was not engaged in his work and was not engaging with others as he normally would and was not being helpful.

57. Ms Thompson was a friend; she was aware that the claimant was undergoing CBT as the claimant had told her. She said he had arranged it himself and had started CBT. She was aware that he was struggling at times in the office. Ms Thompson recollected that the claimant was stating he still had a social life in the period June/July 2018 onwards. She became worried about the clamant in the period before 8th August 2018 when she saw him appearing agitated and anxious. She witnessed him crying at work although she could not remember whether this was before or after a period of sick leave, in which case it could have been in either August or between 11th and 28th September 2018.

58. Both of these witnesses' evidence suggest that things were manifestly not 'normal' with the claimant at work from about May/June 2018.

59. All of the four witnesses were straightforward and honest. I place little weight on Ms Cox's and Ms Reed's evidence about the claimant's conduct at leaving drinks. They were HR professionals who did not work alongside the claimant and I repeat the comment at paragraph 55 above. The evidence of Mr Grimwood and Ms Thompson who worked with the claimant on a daily basis supported the claimant's claim of suffering from anxiety, on their observations, from around May - August 2018.

60. I have read the claimant's impact statement. I note the respondent's assertion that it cannot be relied upon because it has no date references to the claimant's description of his condition. It appears that the impact statement is

more accurate in describing the severity of the claimant's condition in the latter part of 2018 and early 2019.

61. The claimant did not visit his GP between December 2017 and June 2018. Instead, he attended an assessment clinic for the IPAT programme and he commenced CBT on 1st May 2018.

62. The GP notes of 15th June 2018 the GP records that the claimant had been experiencing low mood for more than 12 months. He was prescribed Sertraline at 50 mgs daily from 15th June 2018.

63. In July 2018 the effect of Sertraline was to improve the claimant's mood and in August 2018 the claimant's energy levels had also improved. However it is recorded on 9th August that the claimant was finding it difficult to manage at work with his anxiety and that he had to leave work in the middle of the day on 9th August 2018 because of anxiety, a panic attack. The claimant's prescription was increased by his GP to 100mgs daily.

64. It is clear that the CBT whilst helpful did not resolve the claimant's anxiety adequately or sufficiently and he had to seek medication within six weeks of commencing CBT. He then continued with both medication and CBT.

65. The GP records must be regarded as an objective and truthful account of the claimant's health at the date of each entry in the GP Notes. It is not unknown, in fact it is common for those suffering from depression/anxiety and on medication to hide or mask their symptoms and their feelings from family, friends and work colleagues. The claimant continued with his attempts to deal with his symptoms without medication until June 2018 and he attended work throughout (apart from one day in June 2018) until 8th August.

66. Stepping back to take an overview of the evidence, I find that the claimant's depression/ anxiety state had a substantial adverse effect on him to perform normal day to day activities and that this also affected his professional life. I find that this occurred from about May 2018. I find that there is little supporting evidence of the effect of the claimant's impairment being substantial prior to May 2018. The claimant has not provided evidence specifically of his experience between December 2017 and May 2018. His evidence is that he was still performing stand-up in February 2018. The evidence in his impact statement does not appear to relate to the period between December 2017 and May 2018. There is no evidence that the claimant had cause to visit his doctor between

December 2017 and June 2018when his GP prescribed medication for the first time. From June 2018 through to the end of 2018 the claimant made several visits to his GP and the prescription for Sertraline was gradually increased.

67. From May 2018, once having been prescribed with Sertraline after several weeks of trying an alternative therapy without success, it is evident that the claimant's condition was likely to last at least 12 months.

68. I have read the authorities. I have re-read the respondent's submissions. I find that I am not persuaded to the respondent's point of view that there was a break in the claimant's condition of depression/anxiety prior to October 2018 and that he did not meet the S6 definition of disability until December 2018. That is far too late. Saying to his GP that his sleep or energy levels had improved does not mean they are back to normal. There was also no general improvement in all aspects of his symptoms at the same time. The claimant did not give evidence of what he would have experienced had he not been on medication, but given the deterioration in his symptoms which led to a prescription for medication in June 2018 which was gradually increased to 200mg daily, I can safely assume that the claimant's condition would have been worse than described without medication.

69. In summary the claimant has not established that his diagnosis of depression had a substantial and long term adverse effect on his ability to carry out normal day to day activities until May 2018. From May 2018 I find that the claimant's condition did have a substantial adverse effect on his ability to carry out normal day to day activities. Given the period of time from November 2017 to May 2018 when the claimant's condition did not improve despite CBT, I find that once the claimant had embarked upon a course of anti depression medication, it was likely that the effect of his condition would last a year or more from that date.

Signed by _________________

Employment Judge Richardson
Signed on 27th April 2021