



EMPLOYMENT TRIBUNALS

Claimant: G

Respondent: University of Sheffield

Heard at: Leeds by CVP

On: 4 September 2020

Before: Employment Judge Maidment

Representation Claimant: Prof L Fradkin, lay representative

Respondent: Ms R Barrett, Counsel

JUDGMENT having been sent to the parties on 9 September 2020 and written reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues

1. The claimant has brought complaints of disability discrimination. A purpose of today's preliminary hearing was to determine whether he met the definition of disability within section 6 of the Equality Act 2010 and, if so when. The claimant maintains that he was a disabled person by reason of him suffering from stress and/or PTSD. The tribunal was not at this hearing determining any issue as to the respondent's knowledge of disability.
2. The claimant's complaint of disability discrimination is that the respondent failed to comply with its duty to make reasonable adjustments. This is based on the respondent applying a practice of "gaslighting" – manipulating a person by forcing them to question their thoughts and recollection of events. A number of examples, said to be illustrative of the existence of this practice are raised, without reference to any date of occurrence and, at times, in general terms only. One adjustment, which it is said ought reasonably to have been made, is the respondent's compliance with its sickness absence management procedure. This would have been relevant from the time of

the commencement of the claimant's long-term sickness absence from 26 September 2019.

Evidence

3. The tribunal had before it an agreed bundle of documents numbering some 193 pages. The tribunal heard evidence from the claimant himself and in his support from his wife, H and Dr Fieldman, who had also produced a psychological report completed on 6 August 2020. The Tribunal also had copies of the claimant's medical records.

Factual background

4. As recorded in those records, the claimant attended his GP on 29 April and 29 May 2019 for vaccinations needed for upcoming travel. At an appointment, however, with Dr Fernando on 20 August 2019 the claimant referred to work-related stress with "poor sleep, exercising". The claimant confirmed that he had not spoken to his doctor about stress before then. It was recorded that there were no thoughts of self-harm. The diagnosis of work-related stress was given. No medication was prescribed. That indeed remained the case until 14 May 2020. The claimant's evidence, in cross examination, was that his GP had been recommending antidepressants for a while, but that the claimant was typically averse to taking medication and refused the suggestion. There is no evidence of that in the claimant's medical records, in circumstances where such matters would be more likely than not to have been recorded by a GP if medication was suggested. The tribunal reaches a similar conclusion in respect of the claimant's reference, only in cross examination to his doctor suggesting a referral to counselling.
5. On 26 September 2019 the claimant reported to Dr Fernando continuing work-related issues and feeling that work was overwhelming. The diagnosis of work-related stress was repeated. The claimant was at that point signed off as unfit to attend work until 10 October. The claimant remained off work due to sickness thereafter covered by further fitness to work notes.
6. On 10 October it was noted the claimant felt cold and was suffering from sore throat and slept a lot. By 14 October the claimant had developed problems of his gums. The claimant reported further on this to Dr Fernando at an appointment on 7 November, during which he also talked about work matters and said that he was "under a lot of pressure, felt exhausted, was feeling anxious". The work related stress diagnosis was repeated. On 5 December, the claimant told Dr Fernando about further issues and developments at work and on 9 January 2020 reported that workload issues had not been addressed. The advice was for the claimant to return to work when his duties and workload had been discussed and a plan put in place and, then, on the basis of a phased return.

7. On 7 February 2020 the claimant reported to a Mr Chanian at his GP practice that he had been experiencing bullying in the workplace since 2017. He wished to have a fit note for a further 2 weeks. He reported that his last Occupational Health assessment on 19 December had declared that he may be fit for work providing he had a stress risk assessment. That was due to take place on the following Tuesday and “therefore he would like a further two weeks off”. The claimant, in terms of mood, said that he still felt isolated and very fatigued.
8. By 31 March the claimant did not think, on attending his doctor, that he would be able to return to work at the end of April, even remotely, if some of his issues hadn’t been addressed/resolved. On 20 April 2020 he described childhood neglect and psychological abuse and that, in discussion with his psychologist, he thought he had complex PTSD. He explained that he had bought tribunal proceedings.
9. On 22 April 2020 the claimant described difficulties focusing and that he would like further counselling, i.e. beyond his private counselling already referred to. On 29 April Dr Charles noted the claimant to be frequently talking at a tangent and being “obviously very stressed with work situation.” His sleep was said to be intermittently disturbed by worries about work, with particular reference to difficulties after conversations with his manager.
10. The tribunal has seen an occupational health report produced after an assessment on 19 December 2019. It was said that the claimant was fit to continue in his current role, if his workplace issues could be addressed. He was described as currently off work suffering from stress, anxiety and depression as a result of perceived work based issues. A phased return to work was said to be beneficial and mediation was also advised between the claimant and his line manager. It was said by the occupational health advisor that “the terms of the Equality Act 2010 are likely to apply, although ultimately this would be a legal decision and not a medical one.”
11. The tribunal was also referred to a letter dated 28 May 2020 from Ms Anne Lindley-French, counsellor. She said that she been working with the claimant since September 2017 on approximately a monthly basis. Their counselling had focused on talking therapy. It was not therefore possible, she said, for her to offer a diagnosis of his condition at any point. She noted that the claimant attributed his initial seeking out therapy to work-related concerns. However, in 2017 he had spoken of early life experiences. Over the last year it was said that the claimant was more focused but he did retain an vulnerability with particular reference to ongoing work-related matters. Over the last year she had recommended that he explored the use of EMDR. The claimant’s suggestion was that on describing his life experiences, Ms Lindley-French commented that it sounded as if the claimant could have complex PTSD. The tribunal notes, however, her comment on her inability to offer any diagnosis.

12. The claimant described in his witness evidence the impairments of posttraumatic stress disorder and work related stress. He said that he often had abnormal levels of stress and anxiety, particularly when encountering difficult work situations. He said that the first signs of stress at work arose in early 2017. He required very clear and direct communications to avoid misunderstandings which heightened his stress and anxiety. He described having memory lapses. In cross examination he mentioned leaving the stove on. On discovering a memory lapse his behaviour could become compulsive terms of checking and rechecking matters. He had a tendency to over attach resulting in anxiety and feelings of helplessness and irrationality. He followed directions and procedures very carefully and precisely, but it caused him confusion stress where others didn't. Sometimes he blamed himself irrationally for the fault of others. Sometimes he said his behaviour was overly compliant, as manifested in an inability to challenge/withstand inappropriate behaviour.
13. As a consequence, he said that his personal relationships, sleep, general health and other activities were impacted upon creating a vicious cycle. Another impact might be occasional unhealthy cycles of overeating followed by intense exercise.
14. The claimant's evidence is accepted.
15. The tribunal heard also from H, the claimant's wife. She said that the claimant's mental health began to deteriorate in 2017 due to problems at work. In April 2017, he had taken her to the wrong airport and in the August it transpired, at the airport, that he had forgotten to book flights. She said in cross examination that the situation became worse in 2018. She described an inability to focus and to the claimant completely ceasing to show interest in outside activities. He was said to have started having trouble sleeping in May 2018. He also had trouble making decisions. Despite being very heavily pregnant she had accompanied him in August 2018 on a business trip to Glasgow out of concern for him. She described his mental health as taking a turn for the worst in Autumn 2018 and becoming progressively worse.
16. She described subsequently asking her parents to travel over from [REDACTED] as she felt that she was having to cope with "two babies" i.e. her new-born daughter and the claimant. In cross examination she described noting a change again in the claimant a few months before she starting discussing, in August 2019, with her parents the possibility of them travelling to the UK. They came over in November 2019 and stayed with them for 8 months
17. She described the claimant as experiencing insomnia and loss of concentration. She also said he became sensitive to routine noises. Whilst

he was previously very helpful and attentive, she said he now says that he needs to finish whatever he is doing and then forgets any request for help. On being reminded, he feels upset and guilty. He developed eating disorders, sometimes eating too much and at other times forgetting to eat. An interest in cooking had ceased. The claimant, she said, used to be very social, but now hardly wants to see people. He could no longer be left alone as he forgets to turn off the stove and lock the doors or close the windows when it is raining. He had become unable to discuss anything other than work-related problems, repeating the same concerns over and over again and getting more agitated. He used to make decisions, but he now checked with her on very trivial points. She noted that he often said he saw no hope for the future but reassured her that he still wanted to be with her and their daughter and that their presence kept him alive. H's evidence was not materially challenged by the respondent.

18. The claimant was assessed by Dr George Fieldman, an independent consultant chartered psychologist, on 20 July 2020. In his subsequent report he said that the claimant qualified for a diagnosis of Adjustment Disorder with Mixed Anxiety and Depressed Mood and Occupational Problems. The development of this disorder was said to relate to the lack of resolution of his work-related difficulties.
19. His report recognised that the primary source of information was from the interview with the claimant. Dr Fieldman had also consulted statements provided by his talking therapy counsellor, Ms Lindley-French, his EMDR therapist and the claimant's wife. He had had access to a summary of the claimant's medical records. He described the claimant as presented as a wholly credible source of information. He was said to have given no impression that he might be presenting a biased account or overstating any of his difficulties. He described the claimant as profoundly distressed by a catalogue of events which culminated in his request for sick leave in August 2019.
20. The claimant had attended monthly sessions with Ms Lindley-French, from September 2017. She had recommended EMDR due, he said, to longstanding effects from complex PTSD relating to child neglect and mistreatment.
21. Dr Fieldman's opinion was that a diagnosis of Avoidance Disorder had been overlooked. Evidence for this condition, however, lay in the claimant's reduced ability to remember things, obsessive checking and rechecking, neglectful approach to non-work activities, general clumsiness and absentmindedness.
22. The claimant was currently taking sertraline and, whilst his GP had also prescribed diazepam, the claimant had thus far avoided taking this.

23. Since receiving a disciplinary note of 23 May 2019, the claimant was said to have experienced a worsening of his adjustment disorder symptoms including anxiety and depression. His fatigue levels had progressively increased since the Summer of 2018 to date. Around the time that he stopped working in September 2019 he felt even greater fatigue “due to feeling like he had hit a brick wall and had become burned-out”. His feelings of anxiety and depression been exacerbated by his absence from work enduring longer than originally anticipated and concerns over providing for his family. It was recommended that the claimant sought the assistance of an experienced CBT practitioner.
24. In undertaking various psychological tests the claimant was scored as being in the severe anxiety range in a generalised anxiety disorder questionnaire and as being in the severe depression range in the “Beck Depression Inventory”. The “Beck Anxiety Inventory” placed him in the “modern anxiety” range. A workplace bullying quiz had indicated a likelihood of him having experience consistent and overt bullying in the workplace. Other assessments were referenced.
25. The claimant was noted as having suffered very significant disruption to sleep and impaired concentration.
26. Dr Fieldman agreed that the claimant had never received a diagnosis of PTSD. For Dr Fieldman, the claimant was obviously distressed and PTSD was “one candidate diagnosis”. He was not a clinical psychologist qualified to give a “formal” diagnosis of mental illness. He was unable to assist in the timing of any particular deterioration in the claimant’s health, other than to say that “once things deteriorated at work, his capacity for enjoyment was degraded.”

Applicable law

27. Section 6(1) of the Equality Act 2010 (“EqA”) provides that:

“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”.*

28. The burden lies on the Claimant (**Kapadia v London Borough of Lambeth [2000] IRLR 699, CA**) to satisfy the Tribunal that, on the balance of probabilities, he was disabled at the relevant time.

29. The definition at section 6(1) EqA poses four essential questions:

- a. Did the Claimant have a mental impairment?

- b. Did the impairment have an adverse effect on his ability to carry out normal day-to-day activities?
 - c. Was that effect substantial?
 - d. Was that effect long-term?
30. The Tribunal should state its conclusions separately on each of these questions. However, the Tribunal should not proceed by rigid consecutive stages. In cases where there is a dispute about the existence of an impairment, it makes sense to start by making findings about whether the Claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis) and to consider the question of impairment in the light of those findings (**J v DLA Piper LLP UKEAT/0263/09, at paragraph 40**).
31. An impairment will only amount to a disability if it has an adverse effect on the individual's ability to carry out normal day-to-day activities, i.e. things that people do on a regular or daily basis. Whether the evidence supports that conclusion is a question for the Tribunal. (**Rayner v Turning Point and others UKEAT/0397/10, EAT**, at paragraph 22).
32. Was that effect substantial? "*Substantial*" means "*more than minor or trivial*" (section 212 EqA). Section B1 of the Guidance On Matters To Be Taken Into Account In Determining Questions Relating To The Definition Of Disability (2011) ("the Guidance") states "*The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people*".
33. The primary focus of the Tribunal should be to consider the effects of the impairment on the Claimant. "*In order to be substantial the effect must fall outwith the normal range of effects that one might expect from a cross section of the population. However, when assessing the effect, the comparison is not with the population at large. ... what is required is to compare the difference between the way in which the individual in fact carries out the activity in question and how he would carry it out if not impaired.*" (**Paterson v Commissioner of Police of The Metropolis [2007] IRLR 763, EAT**, at paragraph 27).
34. The Tribunal should focus on what the Claimant could not do because of his impairment, rather than what he could still do despite his impairment (**Aderemi v London and South Eastern Railway Ltd UKEAT/0316/12, EAT** at paragraph 14).
35. The effect of an impairment on more than one activity, taken together, could result in an overall substantial adverse effect (paragraph B4 of the Guidance). An example given at paragraph B5 of the Guidance is as follows:

“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 quite 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.”

36. The Tribunal also refers to the illustrative list of circumstances in which it would be reasonable to regard a person as suffering from a substantial adverse effect which is contained in the Appendix to the Guidance. That list includes *“persistent general low motivation or loss of interest in everyday activities”, “frequent confused behaviour”* and *“persistent distractibility or difficulty concentrating”* as examples of such circumstances.
37. Was that effect long-term? An impairment will have a long-term effect if it has lasted for at least 12 months, it is likely to last for at least 12 months or it is likely to last for the rest of the life of the person affected (paragraph 2(1)(a)-(c), Schedule 1, EqA).). “Likely” means something that “could well happen” (**SCA Packaging Ltd v Boyle [2009] UKHL 37**, at paragraph 2).
38. The impairment must have long-term effect at the time that the alleged acts of discrimination were committed (*Tesco Stores Limited v Tennant [2019] 11 WLUK 730, EAT* at paragraph 11).
39. Did the Claimant have a mental impairment? *“Impairment”* in this context bears *“its ordinary and natural meaning”*. *“It is left to the good sense of the tribunal to make a decision in each case on whether the evidence available establishes that the [Claimant] has a physical or mental impairment with the stated effects”* (**McNicol v Balfour Beatty [2002] IRLR 711, CA**, paragraphs 17 and 19).
40. The Claimant’s impairment is pleaded as stress and PTSD. It is not necessary for the Claimant to establish a medically diagnosed cause for his impairment. He does not need to identify a *“clinically well recognised”* illness. It is the effect of the impairment that must be considered and not its cause (paragraph A7, Guidance).
41. The focus of the Tribunal’s enquiry should be on the effect that the impairment has on the Claimant’s day-to-day activities (**DLA Piper**, paragraph 38). If the Tribunal finds a long-term substantial adverse effect, it will, in most cases, follow *“as a matter of common sense inference”* that the Claimant is suffering from an impairment which has produced that effect.

42. In **DLA Piper**, the EAT drew a distinction between symptoms of low mood and anxiety caused by clinical depression and those derived from a “*medicalisation of work problems*” or “*adverse life events*”, concluding that whilst the former was likely to be a disability, the latter was not.
43. In **Herry v Dudley Metropolitan Council UKEAT/0100/16**, the EAT observed that: “... *there is a class of case where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities*”.

Conclusions

44. Disability status can be difficult to determine and it is certainly not a straightforward issue in this case on the evidence before the tribunal. The burden is on the claimant to show that he was a disabled person at material times. There is a lack of medical evidence prior to August 2019 relevant to any mental health impairment. The claimant has provided himself little evidence of specific effects on his ability to carry out normal day-to-day activities. H’s evidence is more helpful. Dr Fieldman has provided a snapshot of the claimant’s condition when he saw the claimant on 20 July 2020, but it is difficult for him to be clear as to the claimant’s condition prior to then and this condition appears, on the evidence (including the claimant’s taking of antidepressants) to have become materially worse since the initiation of employment tribunal proceedings. Dr Fieldman has inevitably had to rely on what the claimant told him, but he has gone further in his conclusions as to what in fact happened to the claimant at work than one would expect from someone hearing one side of a story. He is not, on his own evidence qualified to make a determinative clinical diagnosis.
45. The causes of the claimant’s alleged impairments are all work related and the tribunal has to be careful not to conflate natural upset and reaction to workplace events with a mental health impairment. However, the origin of the impairment is less important than their effect. The crucial question is whether they expanded beyond the workplace to affect normal day-to-day activities. The tribunal accepts that they did.
46. The claimant described memory difficulties from early 2017. H gave significantly more detail regarding changes in the claimant’s behaviour than the claimant himself. In April 2017, he took them to the wrong airport. She described the loss of interest in things he used to do and feeling very tired. He was having trouble with concentration, becoming distracted, was making mistakes such as leaving the stove on and forgetting to take refreshment. She described him worrying and feeling anxious, subject to mood swings, no longer being calm, enthusiastic and positive about life and becoming a very different person.

47. It is clear from her evidence that the change in the claimant was evolutionary rather than a sudden or overnight change. It appears that there were some isolated incidents of concern to her, but the claimant started having trouble sleeping from May 2018. She was sufficiently concerned about his ability to function in August 2018 that she accompanied him on a trip to Glasgow. By August 2019 the claimant's wife felt the need to ask her parents to uproot from ██████ to help support the family. Nevertheless, the claimant had still been able to continue to attend work. It was only in August 2019 that H was telling him that he shouldn't go to work and should look for help. The claimant saw his doctor reporting work-related stress on 20 August. He said he was suffering from poor sleep, albeit he nevertheless thought that he was fit to attend work.
48. Dr Fieldman attributes a worsening of the claimant's symptoms to 23 May 2019, when the claimant received a disciplinary note. This must indeed be on the basis of what the claimant told him.
49. The claimant returned to his doctor on 26 September 2019 and was at that point signed off as unfit for work. He returned to his doctor thereafter with continuing work-related stress. There was however no specific diagnosis or any reference to any other mental health impairment by his GP although antidepressants were prescribed much later in May 2020. By then the claimant had submitted 2 Employment Tribunal applications and was still absent from work.
50. The tribunal cannot conclude on the evidence before it that at any material time the claimant was suffering from PTSD. It can however conclude that by 26 September 2019 he was suffering from stress and associated anxiety which had a substantial effect on his ability to carry out normal day-to-day activities as reflected in the aforementioned evidence of lack of memory, loss of concentration, fatigue and an inability to gain enjoyment from and to undertake normal social activities.
51. That level of impairment did not straightforwardly arise on 26 September 2019. It had subsisted for a period before this. The lack of any clear chronology of symptoms and more specific examples, however, hamper the tribunal's decision making. There were signs of a developing impairment from April 2017 but insufficient evidence at that point of the necessary substantial adverse effect. Certainly, from August 2019 when H sought family help (and given the significance of that step for her) the impairments had become substantial in their effect. They must have been evident to H during a period of build-up lasting, more than likely, some months before she asked her parents to travel to the UK. Given H's concerns in August 2018 the substantial impairment may already have lasted (just) 12 months by 26 September 2019 when the claimant was signed off work, albeit the evidence would not support a significantly longer prior period of any substantial effect so as to enable the tribunal to fix the claimant's disability

status at a date earlier than 26 September 2019. Dr Fieldman attributes a worsening of the claimant's symptoms to 23 May 2019, when he received a disciplinary note and this ties in with the building up of H's concerns leading to the discussion with her parents in August. The tribunal certainly cannot conclude on the evidence that the necessary effect had lasted for 12 months prior to the 23 May 2019 deterioration.

52. Fundamentally, as at 26 September 2019 the claimant had suffered from an impairment which was likely to last more than 12 months. His condition had caused significant adverse effects on his behaviour from certainly August 2019 and probably from 23 May 2019. 26 September was not the start date of a period of substantial effect (that was on balance earlier in time), but it was a date of significantly escalating effect where the claimant was no longer fit to attend work and was not likely to recover sufficiently to return for some time. In such circumstances, the tribunal is able to conclude that the effect as at 26 September was likely to last 12 months or more in the sense that "it could well happen". Clearly, as at 26 September 2019, this was not an impairment which would go away in a matter of weeks or even just a few months as indeed is typical in cases of mental health impairment.

53. The Claimant was a disabled person within the meaning of Section 6 of the Equality Act 2010 as at and from 26 September 2019 by reason of the impairments of work related stress and associated anxiety.

Employment Judge Maidment

Date 6 October 2020

JUDGMENT SENT TO THE PARTIES ON

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03 June 2021

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FOR THE TRIBUNAL OFFICE

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