EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Mghizou	**v**	Mitie Care and Custody Limited

Heard at: Reading (via CVP) **On:** 12 July 2021
Before: Employment Judge Milner-Moore

Representation
Claimant: Mr G Lee (Solicitor)
Respondent: Ms A Greenley (Counsel)

JUDGMENT having been sent to the parties on 22 July 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This case was listed before me following a case management hearing on 3 February 2021 before Employment Judge Gumbiti-Zimuto who fixed an open preliminary hearing to consider two questions, first whether the claimant was a disabled person for the purposes of s.6 of the Equality Act by reason of chronic anxiety and, secondly, whether a claim of indirect disability discrimination should be struck out as having no reasonable prospect of success. The respondent has confirmed today that they do not pursue any application for strike out in relation to the claim of indirect discrimination and so it has not been necessary for me to consider the second issue.

2. For the purpose of today's hearing I had available to me an agreed bundle of documents and a set of written submissions from the claimant's representative. The agreed bundle included an original witness statement and an amended witness statement from the claimant. I also received oral submissions from both parties. I have not set out the submissions that I have received in detail in this judgment but have aimed to address the key points when explaining the conclusions which I have reached.

3. In light of the evidence before me I made the following factual findings.

Findings of fact

4. The claimant began employment with the respondent on 1 April 2008. He was employed by the respondent as a Detention Custody Officer. The respondent is a large organisation, providing services to various bodies including government departments. It is responsible for providing services and staffing facilities including prisons and immigration centres.

5. The claimant became the respondent's employee by operation of a TUPE transfer which occurred in or around 2014.

6. In or around 2011, the claimant was diagnosed with Crohn's disease and the respondent admits that this condition is a disability for the purposes of the Equality Act. Crohn's disease has a number of unpleasant physical side effects for the claimant, including stomach pain and fatigue. It like psoriasis, another of the claimant's conditions, is exacerbated by stress. The claimant takes various medications for his Crohn's disease, including tramadol, a side effect of which can be anxiety.

7. The claimant also says that he suffers from a mental impairment which he describes as chronic anxiety. He says that this impairment began after the respondent became his employer in 2014 and was related, in part, to the respondent's treatment of him.

8. The claimant's GP has produced a report answering various questions which are relevant to determining whether or not the claimant is a disabled person for the purposes of s.6 of the Equality Act. That report appears at page 89 of the bundle. The GP has written in manuscript answers to questions posed in a letter of instruction. The GP has identified the claimant as suffering from a mental impairment ie, low mood and anxiety which began in March 2014 and is ongoing and the major impacts of which are identified as difficulty sleeping and the lack of concentration. The GP has answered, yes, in relation to the question of whether the impairment is to be regarded as long-term stating, "Mood may improve with further review or counselling, but Crohn's is life-long".

9. The claimant's full GP records pre 2017 have not been produced but there is a GP's letter which summarises the claimant's early medical history. The summary states that the claimant sought assistance from his GP in March 2014 with symptoms of depression and was referred for counselling at that time. The claimant's evidence was that he saw his counsellor two or three times for talking therapies. The claimant was seen by his GP again in August 2014 and signed off work for a week, reporting stress at work and family stresses.

10. In 2016, the claimant saw his GP again complaining of stress at work and was signed off for four weeks. It seems likely that he was also presenting at that time with symptoms of depression as he was prescribed anti-depressants.

11. In 2017, the claimant was seen by his GP again in July and signed off work for four weeks again with stress at work. Then in September 2017 he was signed off again for a further two weeks in relation to stress at work.

12. In 2018, he was seen by his GP and signed off with stress relating to family issues, although it was for a relatively short period on that occasion.

13. The claimant had various health issues during 2017 which resulted in his being referred to the respondent's Occupational Health advisers. An Occupational Health Report dated September 2017 appears at page 71 of the bundle. It reports that the claimant was suffering from chronic anxiety which his GP was monitoring and treating and that he had been referred for counselling. It noted that mental ill health could have adverse effects on

cognitive ability, memory, focus and could lead to insomnia. It expressed the opinion that the claimant was likely to be disabled and recommended various adjustments, including a Stress Risk Assessment.

14. On 14 May 2019, the claimant was seen again by Occupational Health, predominately in relation to adjustments for his Crohn's disease, but the report also records the claimant saying that he was disgruntled with his employer and that he had flat mood and was experiencing poor sleep. The Occupational Health Report advised a Stress Risk Assessment to address the workplace issues and to avoid exacerbating the claimant's Crohn's disease, which would be worsened by stress. It also suggested that the claimant would benefit from further counselling.

15. In July 2019, the claimant's GP provided a letter stating that the claimant was currently experiencing a lot of work-related stress which could exacerbate his Crohn's and psoriasis and the letter supported his being assigned to work on night shifts.

16. At around this time the claimant was signed off sick for a month and referred for counselling via iCope. The claimant says that he had two or three sessions of counselling at that time and that he has remained able to self-refer for more counselling subsequently if needed.

17. On 19 December 2019 the claimant was dismissed in circumstances that I need not go into for the purpose of this decision.

18. In July 2020 the claimant saw his GP again reporting stress and low mood and was advised to self-refer for counselling.

19. In August 2020 he saw his GP again stating that he was suffering from crippling insomnia and stress and was prescribed sleeping tablets.

20. In January and February 2021, he saw his GP in connection with anxiety. The GP notes record that sertraline had not helped the claimant previously and so he was prescribed first citalopram and later duloxetine. At around this time the claimant was again reporting depression and anxiety, describing difficulty focusing, insomnia and low appetite.

21. In addition to the medical evidence I heard evidence from the claimant himself. He had prepared an Impact Statement. There were two versions of the statement, a final version and an earlier version. It was possible to see the differences using tracked changes. It was suggested by the respondent that the claimant's Impact Statement was misleading in various respects. It glossed over the time at which certain symptoms began to manifest. In particular, reliance was placed on the fact that a passage in the initial draft had been deleted. The passage, which began to describe various symptoms, stated "Since my dismissal" as a precursor to that description and those words were deleted in the final version. It was also suggested that the statement was misleading in listing the medications which the claimant took, without making clear that most of these related solely to his Crohn's disease. For these reasons, it was suggested that I should treat the claimant's Impact Statement with a degree of caution. I accept that the list of medications contained in the Impact Statement arguably gave an incorrect impression that all of these related to anxiety when that was not case. The statement listed a number of medications which the claimant had been prescribed, but almost

all of these were prescribed for his Crohn's disease. Only two of the medications listed, citalopram and duloxetine, had been prescribed specifically for anxiety or depression. Those were prescribed in February 2021. However, equally, the list of medications was not comprehensive because it failed to list the medication that the claimant had been prescribed for an earlier period of depression in 2016 (this appears to have been sertraline). I also consider that the Impact Statement could have been clearer about when the various symptoms of mental impairment first began to present. However, that said, I accepted that the claimant has genuinely experienced adverse impacts as a result of a mental impairment, in the form of anxiety and low mood, since 2014. I did not consider that such effects only became substantial after dismissal.

22. I made the following findings in relation to the impact of the claimant's mental impairment on his ability to carry out normal day to day activities. Since 2014, the claimant has, at various times, experienced the following adverse effects to a degree that is more than minor or trivial.

    a. He has engaged in worrying excessively and found it difficult to switch off anxious thoughts;

    b. He has avoided situations that he finds difficult, for example he is unwilling to shop alone in case he needs to ask strangers for assistance and he is reluctant to do so.

    c. He has experienced difficulty concentrating, finding it difficult to concentrate when watching television or reading books.

    d. His appetite is affected and he is reliant on his wife to ensure that he is eating properly

    e. He has experienced low mood and this has led him to be unwilling to socialise with friends, or to engage in normal social interactions.

23. The claimant also describes some further symptoms which I consider are likely either to have occurred, or to have become substantial, since the time of his dismissal. In particular, the claimant is reluctant to answer the telephone to anyone apart from family. He also reported difficulties with washing and dressing. In part these difficulties were due a worsening in his mental impairment after his dismissal. In so far as the reported difficulties related to earlier periods, these difficulties were due to the after effects of operative procedures, or to his Crohn's disease, rather than to anxiety or low mood.

The law

24. Section 6 of the Equality Act sets out the definition of disability in the following terms:

> "(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."

25. Substantial is defined at s.**212(1**) of the Equality Act as meaning more than minor or trivial. Schedule 1 of the Equality Act further explains the requirement that any impairment must be long-term. At paragraph 2 it states:

> "(1) The effect of an impairment is long-term if:
>
> (a) it has lasted for at least 12 months,
>
> (b) it is likely to last for at least 12 months
>
> (c) it is likely to last for the rest of the life of the person affected."
>
> (2) If an impairment ceased 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 it is likely to recur."

26. Paragraph 5 of Schedule 1 makes clear that, in deciding whether or not an impairment has a substantial adverse effect, one should disregard corrective measures such as medical treatment or the use of a prothesis or other aid.

27. In the definition of disability at s6 Equality Act 2010 the word 'likely' means "could well happen" rather than something that is more likely to happen than not.

28. The onus is on the claimant to prove the impairment on the balance of probabilities (McNicol v Balfour Beatty Rail Maintenance). The cause of an impairment need not be established (Hospice of St Mary Furnace v Howard). The mere fact that medical notes make reference to anxiety or stress and depression will not necessarily amount to sufficient to prove a mental impairment amounting to a disability (Morgan v Staffordshire University [2002] IRLR).

29. When considering the impact of an impairment on day to day activities then the focus should be on what the claimant cannot do, or can do only with difficultly. When making the assessment of whether or not a condition is long-term, the relevant point in time at which the assessment is to be made is the date of the discriminatory act complained of. The tribunal should make its assessment as to whether a condition is long term (because it is likely to continue or recur by reference) to the evidence as to the circumstances obtaining at the relevant time (Richmond Adult Community College v McDougall).

30. In considering the likelihood of recurrence the tribunal should approach it in four stages. (1) Was there at some stage an impairment which had a substantial adverse effect on the ability to carry out normal day to day activities? (2) Did the impairment cease having such an effect? (3) What was the substantial adverse effect. (4) is the substantial adverse effect likely to recur? Any recurrence of the substantial adverse effect itself need not last for 12 months. Where the substantial adverse effect has ceased, it is to be treated as lasting for so long as the substantial effect is likely to recur Swift v Chief Constable of Wiltshire Constabulary.

Conclusions

Impairment

31. I consider that the claimant has a mental impairment. The impairment has been characterised in various ways in the medical document: as either stress, or low mood, or depression, or anxiety (in the GP notes) or chronic anxiety or stress (in Occupational Health Reports). I consider that these labels are describing the same mental impairment, anxiety with low mood, and that the claimant has been adversely affected by this impairment since 2014.

Effect on normal day to day activity

32. I consider it likely that this condition has had an adverse effect on the claimant's ability to carry out normal day to day activities. In light of the evidence from the claimant and from his medical records, I consider that, since 2014, the claimant has from time to time been adversely affected in relation to the normal day to day activities. He has become reluctant to engage with strangers or do ordinary activities such as going shopping. He has been reluctant to, or found it difficult to, engage in normal socialising with friends. He has experienced loss of appetite. He has had periods of worrying excessively and these matters have impacted on his ability to concentrate on ordinary matters.

Substantial adverse effects

33. "Substantial" is a low bar. It means that the effect must be more than minor or trivial. In considering whether or not the effects of a condition are substantial it is necessary to consider what the effects would be disregarding any ongoing medical treatment. I consider that there have been periods where the claimant has experienced a substantial adverse effect on his ability to carry out the normal day to day activities described as a result of his impairment. In particular, during 2014, 2016, and 2017 he was sufficiently impacted by his anxiety to seek treatment from his GP and to be prescribed anti-depressants, to be referred for counselling and to be signed off work for a month on at least two occasions and for shorter periods on two other occasions.

34. The claimant has described the impacts of his condition on his ability to carry out normal day to day activities. I accept that these are likely to have fluctuated but I consider that they will have been present to a degree likely to be substantial at various points over these years and, in particular, when the claimant has sought GP treatment for them.

35. I have had regard to the non-exhaustive and illustrative list (which appears in Appendix 1 of the 2011 Guidance on Disability) of the types of matters which would, or would not, amount to a substantial adverse impact. I consider that this list is consistent with my assessment of the effects reported by the Claimant as substantial. Listed as substantial effects in Appendix 1 are matters such as: persistently wanting to avoid people or significant difficulty taking part in normal social interaction, persistent general low motivation or loss of interest in everyday activities and difficulty concentrating.

Long term.

36. I have made reference to the McDougall case and the requirement that, in making the assessment of the likely duration of an impairment or the likelihood of its recurrence, I must do so by reference to the evidence as to the circumstances obtaining at the time of discrimination. So, I have to make that assessment by reference to the evidence available in December 2019 when the claimant was dismissed and not by reference to subsequent events. I have also had regard to the 2011 Guidance on Disability and, in particular, to paragraph C5 and 7.

37. I consider that the impairment first began to have substantial adverse effects in 2014 when the claimant went to see his GP complaining of a mental impairment (stress and depression). It seems likely that it ceased to have such an effect within a few months as claimant was referred for only two or three sessions of therapy and then sought no further assistance until August 2017. So, that phase of substantial adverse effect in March 2014 did not last for 12 months, but I need to go on to consider whether nonetheless, the adverse effect of the mental impairment was likely to recur.

38. I consider that the evidence established that the impairment was likely to recur at the relevant time (December 2019), indeed it had recurred several times by that date. By December 2019 there had been several instances of the claimant being signed off for significant periods with a mental impairment. The claimant reports that he was experiencing substantial adverse effects at various times during the period between 2014 and 2019. I therefore consider that his evidence establishes that the claimant's mental impairment of anxiety was indeed likely to recur. I consider that the Occupational Health report was correct to assess in September 2017 that the claimant was a disabled person by reason of anxiety by September 2017.

39. It was suggested by the respondent that I should disregard these earlier instances as not meeting the threshold for disability. I do not agree with that assessment. There are at least four instances before 2018 when the claimant felt sufficiently affected to seek medical treatment, was prescribed antidepressants, had counselling and had significant periods of time off work despite the fact that this had financial concerns for him. He has explained the impact that his symptoms were having on his ability to carry out day to day activities. Even the July 2019 Occupational Health Report records that was continuing to report stress and low mood due to work. It was also suggested that anxiety and depression are entirely different conditions and that it would be wrong to regard them as a single impairment. Depression and anxiety are both mental impairments and are not wholly unrelated. I do not consider that it is appropriate to focus on the precise label. I consider that the key issue here is that the claimant has experienced a mental impairment which has had substantial effects on his ability to do day to day activities on a recurring basis since 2014 and that is not relevant to focus on the precise medical label attached.

40. So, for all those reasons, I have concluded that the claimant was a disabled person by reason of anxiety within the meaning of s.6 of the Equality Act 2010.

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Employment Judge Milner-Moore

Date: 26 July 2021…….

Judgment sent to the parties on
13 August 2021
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THY
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For the Tribunal office