EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr C Jolly	**v**	Whitbread Group Plc
Heard at: Cambridge		**On**: 21 September 2021
Before: Employment Judge Tynan (sitting alone)		

Appearances
For the Claimant: In person
For the Respondent: Ms A Kent, Solicitor

JUDGMENT on PRELIMINARY ISSUE

The Claimant was at the relevant times a disabled person within the meaning of Section 6 of the Equality Act 2010.

REASONS

1. By a claim form received by the Employment Tribunals on 3 April 2020, the Claimant pursues complaints against the Respondent of unfair dismissal and discrimination on the grounds of disability.

2. The Claimant completed section 12 of form ET1 on the basis that he did not have a disability. I accept his evidence that section 12 was completed in error. It is abundantly clear from the four page details of claim appended to the claim form that the Claimant was asserting that he had a disability and, indeed, he set out in some detail the relevant facts and circumstances relied upon by him in that regard.

3. The Claimant's complaints are denied in their entirety by the Respondent who, at the Hearing, continued to dispute that the Claimant meets the statutory definition of disability within Section 6 of the Equality Act 2010. The Respondent had put the Claimant to proof as to his claim to be disabled.

4. I heard evidence from the Claimant. He was straight forward in his evidence to the Tribunal. He had submitted a disability impact statement

in support of his claim to be disabled. That statement is to be found at pages 38 – 41 of the Hearing Bundle.

5. I note, by way of an initial observation, that Ms Kent's questions of the Claimant were very limited as regards the claimed disability of depression. She asked him firstly about his error above in completing form ET1 and secondly about an alleged gap in his consultations with his medical advisors and GP in the period August 2016 to July 2019. Ms Kent was incorrect in her questions and submissions in this regard, as I shall return to. Otherwise, the principal focus of Ms Kent's questions and submissions was in relation to the second claimed impairment, namely dyspraxia.

6. I had available to me a single Bundle of documents running to some 86 pages.

7. For convenience I deal with the Claimant's claimed impairments in turn, in the order in which they are said to have arisen, albeit noting that someone who has suffered from a combination of impairments with different effects and to different extents over a period of time, which may have overlapped, can still be regarded as disabled. In this respect I have regard to the Statutory Guidance on the Definition of Disability, in particular, the section dealing with the cumulative effects of impairments which begins at paragraph B4 of the Statutory Guidance. Paragraph B6 states that a person may have more than one impairment, any one of which alone would not have a substantial effect on day to day activities. The Statutory Guidance says that in such a case account should be taken of whether the impairments together have a substantial effect overall on the person's ability to carry out normal day to day activities. For example, a minor impairment which affects physical co-ordination and an irreversible minor injury to a leg which affects mobility, when taken together might have a substantial effect on the person's ability to carry out certain day to day activities. The cumulative effect of more than one impairment should also be taken in account when determining whether the effect is long term.

8. As regards the Claimant's claimed disability by reason of depression, in my judgement there is a significant weight of evidence in support of the Claimant's claim that he is disabled by reason of depression. I refer to the Claimant's medical records from St Clément's Surgery. I can see from the Hearing Bundle that there was an initial disclosure of records in or around August 2020, focused on his depression. A more comprehensive set of records was generated on or around 9 December 2020; they start at page 53 of the Hearing Bundle and continue through to page 69, with further notes relating to a Wellbeing Service following on from that.

9. The Claimant's medical records evidence that on 23 November 2011 he presented at his GP surgery with depressed mood and that he was prescribed Fluoxatine, a well known anti-depressant medication.

10. On 17 December 2014, the Claimant presented at his GP surgery again and reported that he had been feeling down for a period of perhaps three to four months. He was again prescribed Fluoxatine.

11. In February 2015, during a consultation with his GP, it was noted that the Claimant was reporting that *"things have become stagnant"*. He continued to be prescribed Fluoxatine for his low mood.

12. In November 2015, by then more than one year after his symptoms of depressed mood had first been experienced, the Claimant's GP noted that he wanted to "*wean down on Fluoxatine*".

13. In August 2016, nine months or so later, the Claimant's GP records document that he was depressed again. The records note that he was tired, had a loss of concentration, cried easily and was not fully in control of his emotions. At that stage he was prescribed Citalopram. Citalopram is a well known medication for managing both depression and anxiety.

14. In October 2016, the Claimant was referred to a Wellbeing service. Further details are at pages 70 – 73 of the Hearing Bundle.

15. Ms Kent questioned the Claimant and made submissions to the effect that there had been no further medical interactions after August 2016 until July 2019. That is incorrect. The Wellbeing referral came about because the Claimant had seen Mr Simon Sweeney, one of the nurses at his GP Surgery in October 2016. He subsequently attended a Wellbeing Workshop in November 2016, and this was followed up with eight weeks of Mindfulness sessions for depression and anxiety. In early December 2016, the Claimant booked a place on a two day Understanding Your Mental Health course, to commence in January 2017. There is also reference in the Claimant's records to a Workshop session on 30 January 2017, albeit that the Claimant had not attended. The letter referring to that session at page 73 of the Hearing Bundle notes that the Claimant had scored on assessment 17 in respect of his mood and 7 in respect of his anxiety. Those scores suggested borderline moderate to severe depression. The Claimant's medical records also confirm that he continued to be prescribed Citalopram over an extended period from August 2016 through to October 2017; a period of longer than a year.

16. The Claimant attended his GP surgery on 17 August 2018, when he discussed his situation again with Mr Sweeney. His records document that he was feeling low at that time and wanted to recommence Citalopram. He continued to be prescribed Citalopram through to 12 March 2019 (page 64 of the Bundle).

17. Thereafter the Claimant was seen by his GP on 25 July 2019 when a detailed assessment of his medical situation was carried out. The formal diagnosis was that he had depression. There is a detailed description at the bottom of page 64 / the top of page 65 of the Hearing Bundle, in which Dr Moffat notes as follows:

> *"Little interest or pleasure in doing things: nearly every day*
> *Feeling down, depressed or hopeless; nearly every day*
> *Trouble falling asleep or staying asleep or sleeping too much: nearly every day*
> *Feeling tired or having little energy: nearly every day*
> *Poor appetite or overeating: several days*
> *Feeling bad about yourself, that he is a failure or have let yourself or your family down: nearly every day*
> *Trouble concentrating on things such as reading the newspaper or watching the television: nearly every day*
> *Moving or speaking so slowly that other people could have noticed? Or the opposite, being so fidgety or restless that you have been moving around a lot more than usual: more than half the days*
> *Thoughts that you would be better off dead or of hurting yourself in some way: not at all."*

18. Dr Moffat described this as a 'new episode', though of course it has to be seen in the context that this was an individual who had had depressive episodes over the preceding eight years or so and that he had only recently stopped taking Citalopram in March or April 2019 before experiencing a further depressive episode in July 2019.

19. Following the consultation on 25 July 2019, the Claimant was certified unfit for work. He remained unfit for work from that date through to 9 December 2019. He was certified, I find, with depression as the reason for his absence.

20. The Claimant was initially prescribed Mirtazapine at a dosage of 30mg. However, there seems to have been a change in medication on or around 7 August 2019 when the Claimant went onto Sertraline, another anti-depressant medication. Initially starting off at 50mg, within two weeks that dosage increased to 100mg and by 21 October 2019 (page 68 of the Hearing Bundle) the prescription level would seem to have increased to 150mg.

21. The available GP records continue through to August 2020. However, I am only concerned with the position up to and including 4 February 2020 when the Claimant was dismissed from the Respondent's employment. What happened and how his condition progressed after the date of dismissal does not inform my judgement as to the Claimant's condition, since Tribunal should guard against approaching the question with the benefit of hindsight; disability is to assessed at the relevant time.

22. The Hearing Bundle includes letters from Dr Geoff Isaacs, consultant psychiatrist, dated 30 November 2019 and 16 January 2020. The November 2019 letter notes that "things may have improved significantly" although does caution that this could be temporary, or indeed could be related to an increase in the Claimant's medication. Dr Isaacs also

recognised there are some challenging circumstances, which I accept, as the Claimant says, was a reference to his work situation.

23. On 16 January 2020, Dr Isaacs wrote following a consultation the same day at which he had discussed with the Claimant, amongst other things, the Claimant concerns that he may have dyspraxia. Dr Isaacs wrote,

> *"You have recently taken your son to see someone, because of what are difficulties in motor control. You, yourself, have had these difficulties all your life, although not to his degree. You have also had left / right confusion, although without any of the other features of dyslexia. You have also had difficulties with focus and concentration and forward planning, that would suggest either the expanded definition of dyspraxia, or an overlap with ADHD."*

24. The Claimant was not cross examined about his Disability Impact Statement and accordingly was not challenged in terms of what he says were the symptoms or the impacts of the symptoms of his claimed impairments on his daily activities. He lists them out helpfully under separate headings. In relation to 'Depression' he summarises the impacts as: constant feelings of unhappiness; hopelessness; feeling lonely and disconnected from others; constantly tired and exhausted, feeling burned out; loss of motivation; loss of self-esteem and confidence; brain fog, finding it hard to think clearly; finding it hard to concentrate; not wanting to talk to or be with other people; eating more; and an inability to relate to other people and feeling isolated. Although this was not noted during the July 2019 consultation, the Claimant states that he had experienced suicidal thoughts "over the past year". His Statement was made in October 2020, so that if he did experience suicidal ideation, that may well be largely during the period after his employment with the Respondent had terminated.

25. Under each of those headings, the Claimant goes on in his Statement to describe the effects in some detail; detail which I accept accurately describes the effects that he has experienced and the impacts on his day to day activities. The Claimant was not challenged on any of this. I completely accept his account on these matters, which is consistent with what he reported to his GP and is documented in his GP medical records in July 2019.

26. As regards the claimed condition of dyspraxia, the Claimant refers in his Statement to having been diagnosed with dyspraxia. Ms Kent has a point in so far as says it is hard to read into Dr Isaacs' letter a formal diagnosis as such. The relevant part is the penultimate line at page 75 of the Hearing Bundle, where Dr Isaacs refers to the Claimant's

> *"…difficulties with focus and concentration and forward planning"*

and goes on to say,

"…that would suggest either the expanded definition of dyspraxia or an overlap with ADHD".

27. Dr Isaacs does not definitively diagnose the Claimant as having dyspraxia, but certainly he was of the view that what was being reported was at least consistent with either dyspraxia or ADHD.

28. The claimed symptoms and effects on day to day activities are helpfully described again by the Claimant under separate headings. He refers to: fatigue; trouble learning new skills; difficulty writing; low self-esteem; social awkwardness; and lack of confidence. I have had regard to the Equal Treatment Bench Book, in particular the Appendices include a section in relation to dyspraxia. What the Claimant describes in his Statement is consistent with the Equal Treatment Bench. Ms Kent may say that this is self-diagnosis, but what the Claimant is describing is consistent with the resources available to me as a Judge. Of course, those symptoms overlap in many respects with the symptoms and the stated day to day effects of his depression, including fatigue and impaired concentration which impact the ability to learn new skills, low self-esteem, social awkwardness and a lack of confidence. There is clearly an overlap between what is stated in relation to depression and what is stated in relation to dyspraxia.

THE LAW

29. Section 6 of the Equality Act 2010, provides as follows:

> Disability
>
> (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.

30. Section 212 of the Equality Act 2010, clarifies that:

> (1) In this Act-
>
> …
> 'Substantial' means more than minor or trivial.

31. There are supplementary provisions in relation to disability in Schedule 1 of the 2010 Act. Guidance has been issued by the Secretary of State regarding matters to be taken into account by Employment Tribunals in determining questions relating to the definition of disability.

32. I am required to take into account any aspect of the Guidance which appears to be relevant. Paragraph A2 of the Guidance contains a helpful analysis of Section 6 of the Equality Act 2010:

> Main elements of the definition of disability-
>
> A1 …
>
> A2 This means that, in general:
>
> - the person must have an impairment that is either physical or mental;
> - the impairment must have adverse effects which are substantial;
> - the substantial adverse effects must be long term; and
> - the long term substantial adverse effects must be effects on normal day to day activities.
>
> All of the factors above must be considered when determining whether a person is disabled.

33. Paragraph 2 of Part 1 of Schedule 1 to the Equality Act 2010, clarifies:

> Long term effects-
>
> (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; or
> (c) it is likely to last for the rest of the life of the person affected.

34. As I indicated at the beginning of this Hearing, it is well established that the onus of proving a disability is on the Claimant, on the balance of probabilities (Morgan v Staffordshire University [2002] IRLR 190).

35. In coming to this Judgment, I have regard to the Employment Appeal Tribunal's decision in J v DLA Piper UK LLP UKEAT0263/09/RN in which Underhill J, as he then was, drew a distinction between the symptoms of low mood and anxiety caused by clinical depression, which was a situation likely to meet the definition of disability, and those derived from a reaction to adverse circumstances such as problems at work, or adverse life events, which was not.

36. The Employment Appeal Tribunal acknowledged there is a line between those two states of affairs which might be blurred, but Underhill J gave guidance as follows:

> *"We accept that it may be a difficult distinction to apply in a particular case and the difficulty can be exacerbated by the looseness with which some medical professionals and some lay*

> *people use such terms as depression, clinical or otherwise, anxiety and stress. Fortunately, however, we would not expect those difficulties often to cause a real problem in context of a claim under the Act. This is because of the long term effect requirement. If as we recommend at paragraph 42 above, the Tribunal starts by considering the adverse effects issue and finds that the Claimant's ability to carry out normal day to day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering clinical depression, rather than simply a reaction to adverse circumstances. It is a common sense observation that such reactions are not normally long lived."*

37. In my judgement, the Claimant's issues were not what might be called medicalisation of employment problems, they reflected a very longstanding depressive illness and pronounced depressive episodes, which significantly impacted the Claimant's ability to carry out his normal day to day activities. Those effects have been more than minor, in my judgement they have been substantial in terms of the Equality Act 2010. They are as described by the Claimant, both in relation to his dyspraxia but particularly his depression, including unhappiness, hopelessness, feeling lonely and disconnected from others, constantly tired and exhausted and burned out, lacking motivation, lacking self-esteem and confidence, brain fog, finding it hard to think clearly, finding it hard to concentrate and not wanting to talk to or be with people, as well as dietary problems and in turn weight gain.

38. The Statutory Guidance at paragraph B5 recognises that depression is typically an impairment with fluctuating or recurring effects. Sadly, for the Claimant, rather than experiencing fluctuating effects, I conclude there has been almost constant adverse effects over a period of eight or nine years. There have undoubtedly been some gaps, periods when he did not take medication, but those gaps have been few and far between. Certainly as regards the short two or three month period in spring / early summer 2019 when the Claimant came off his medication, I do not consider that this gap in his medication evidences that he made a recovery from his depression. I find to the contrary that his depression was ongoing and that he continued to experience significant mental ill health. In my judgement, the Claimant became socially withdrawn, anxious and depressed from at least 20014 and this has persisted over a number of years and indeed has led to his anti-depressant medication dosage being increased.

39. Paragraph 2(2) of Part 1 of Schedule 1 to the Equality Act 2010, says:

> (2) 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. Even if Ms Kent were right to say that the July 2019 episode was a new episode (and I note of course that it is recorded in those terms in the GP's

records), given his history of mental ill-health, the adverse effect on day to day activities would either be likely to last more than 12 months from that date, and /or he had a condition that was likely to recur. The Claimant has had either constant depressive illnesses since 2011, or he has had a recurring depressive illness since 2011. I do not think it matters which it is because either he has had those effects for more than 12 months, or he had a condition that was likely to recur. I bear in mind paragraph C3 of the Guidance that in this context, likely should be interpreted as meaning that it could well happen. In my judgement it could well be said in 2011, 2014, 2016 and 2019 that this was a condition that could well recur.

41. I deal briefly with the Claimant's claimed dyspraxia. In and of itself I would not find it to be a disability, but it has to be seen as part of the overall mix in this case. I return again to paragraph B6 of the Statutory Guidance, namely that one may need to look at impairments in combination and that one must consider the whole person in order to identify what their situation is. Certainly it was the view of Dr Isaacs that the Claimant has symptoms which are at least consistent with dyspraxia. To my mind that is part of the overall picture in relation to this Claimant. I do not think anything ultimately turns on this since the Claimant's depression alone means, in my judgement, that he is disabled within the meaning of Section 6 of the Equality Act 2010.

42. The onus is on the Claimant to prove he has a disability on the balance of probabilities and in my judgement he has more than discharged the burden upon him. Accordingly, I make a declaration that the Claimant was, at the relevant times, a disabled person within the meaning of the Equality Act 2010.

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Employment Judge Tynan

Date: …12th Oct 2021…….

Sent to the parties on: .22nd Oct 2021..

.....THY
For the Tribunal Office