



EMPLOYMENT TRIBUNALS

Claimant: Mr J Arundel

Respondent: Just Eat UK Limited

Heard at: Manchester (by CVP)

On: 2 December 2021
20 December 2021
(in chambers)

Before: Employment Judge Feeney

REPRESENTATION:

Claimant: Mrs Lana Smith, mother

Respondent: Mr S Brochwicz-Lewinski, counsel

JUDGMENT

The judgment of the Tribunal is that the claimant was disabled within the meaning of the Equality Act 2010.

REASONS

1. The claimant brings claims of unfair dismissal and disability discrimination. The respondent has not conceded that the claimant is disabled within the meaning of the Equality Act 2010 and therefore the hearing was listed for today in order that I might determine that matter. Due to various difficulties the hearing was not completed until the end of the day, accordingly I was not able to give an oral judgment and therefore the matter was reserved.

The Issues

2. Was the claimant disabled within the meaning of the 2010 Act in that:-
 - 2.1 He had an impairment which had a substantial adverse effect on his day to day activities;
 - 2.2 That impairment had by the date of the relevant acts lasted for twelve months or was likely to last for twelve months. The relevant period is as far I can determine March 2020 to February 2021..

Witnesses

3. The claimant provided an Impact Statement and gave evidence to the Tribunal. The respondent provided a statement from Dr Henderson, a Psychologist who had written a report on the basis of the medical records and the impact statement, but he had not examined the claimant.

Findings of Fact

4. The claimant worked for the respondent from 16 November 2017 to 26 January 2021 as a Territory Manager. His job originally involved visiting restaurants etc and marketing Just Eat's services to them. Eventually, hopefully, signing them up as customers. Overall, the claimant's case was that when he had a new manager appointed the new manager began to undermine him in various ways prior to the furlough period resulting from the pandemic. However, he did not give any dates prior to the pandemic lockdown in March 2020 He sought to establish that his mental illness had begun prior to March 2020 and certainly prior to December 2020 when he was absent from work due to depression and stress .
5. The manager I will refer to as MA. The claimant mentioned the following incidents specifically, other instances did not have a time attached to them:-
 - (i) June/July 2020. To lift morale there was a discussion about having a cake baking competition. MA said to the claimant 'you don't have time to be baking cakes you are paid to work'. The claimant described this as "demotivating and demoralising".
 - (ii) That he made constant negative remarks about the claimant's hair during lockdown which the claimant said "did actually bother me but I tried to make light of it".
 - (iii) 'Never satisfied with the way I planned my work,' no time given, no effect described.
 - (iv) Issue over salary. The claimant has not given a date for this, but he says "I was made to feel as though I was being unreasonable" and later that I was "exceptionally upset by this".
6. The claimant also said that he was worried about his mother's cancer treatment in March 2020, he was concerned about bringing the virus home because of her vulnerability and discussed his worries about visiting restaurants (which was part of his role) while the virus was at large. He felt upset as MA said that surely he was going out to pubs and restaurants personally so what was the problem with doing it professionally .Again there is no exact time on this as if he was visiting pubs etc it must have been before 22 March 2020.
7. More generally the claimant commented (in his ET1) that he found working from home difficult, it was depressing and he told his manager how

depressing it was, particularly now that he had to do everything by telephone rather than visiting people in person and he did not have a comfortable workspace at home.

8. He also said he suffered from backache due to his unsuitable workstation and this prevented him from doing his exercise regime which had helped to relieve his stress.
9. The claimant also referred to being rude and short tempered with his family and friends, that during this period he had separated from his girlfriend of eight years and stopping socialising with his family. He said he could not concentrate when reading a book so stopped trying and he could not sleep at night. He says "I was feeling more and more useless as a person" however he does not particularly date these feelings although it is apparent they arose after lockdown.
10. The claimant also relied on emails which he believed supported the fact that he was having mental health problems for longer than maybe apparent from these medical records
11. He also referred to an email of 2 April 2020 which was about courses he wished to go on, he was allowed to select three from a longer list and one of the three was stress and resilience although the others had nothing in particular to do with mental health he relied on that to show he was needing help at that point in time. I do not find there was any significance in this, it was a simple choice he did not add why he felt he needed a resilience course and ofcourse many other people would have chosen that as a precautionary measure.
12. On 1 May 2020 there was also an email regarding the presentation which ended up with his manager saying to him "keep that chin up mate and we will get through this in no time thanks for all your efforts", again, he said this was corroboration of the fact that he was suffering substantial adverse effects for a longer period than the respondent suggested. The comment does lend some weight to the claimant's mental health starting to deteriorate.
13. There was also an email from 8 April where the claimant said he had no recollection of doing something which he relied on to show that his concentration was very low at that point in time.
14. In June 2020 he did a presentation and in that described about his feelings about working from home where he states "the impact this was having on me personally was a struggle". After this MA commented that he knew the claimant was struggling mentally.
15. There was another email from persons unknown (probably MA) on 6 July about his bonus payment which stated that "you have found this time during lockdown incredibly tough and you haven't found it easy doing things over the phone, hopefully the end is in sight and you can soon get back out on the road",

16. These two emails corroborate that the claimant was having significant difficulties.
17. Also on 15 September he was written to again saying “following on from our conversation early today I wanted to put everything we spoke about down in an email to make sure we are doing everything we can to support you ... your wellbeing and mental health is super important and we will do everything I can to help you. If you don’t feel comfortable talking to me about it that is fine but there are lots of other things available to support you, we discussed what was available in the kitchen, please see link below”. Again, the claimant relied on this, not in relation to the respondent’s knowledge which will be relevant later on, but as corroboration that he was suffering before he went to see a doctor quite seriously from mental health problems. I agree that it does corroborate his mental health was deteriorating before he went to see a doctor.
18. On September 11th the claimant collapsed in the kitchen banging his head badly on the tile floor but did not seek medical help. After that he suffered headaches and some vision problems and periods of confusion. He was unable to concentrate, he put the inability to concentrate down to his depressing situation although now he thinks it was some sort of stress reaction.
19. Around 23 November the claimant was challenged about how he had spent his time on a certain date as his car tracker did not accord with him working from home. He advised MA that “I was feeling really depressed and was actually struggling to concentrate and having dark thoughts I should not be having, I needed to get out and try and clear my head and I needed fresh air”. After a difficult conversation with MA on 30 November the claimant had trouble breathing and had tingling sensations, on reflection he and his mother now believe that was a panic anxiety attack and his mother insisted that he made an appointment with the doctor.
20. On the 27 November 2020 the claimant was invited to a disciplinary hearing to discuss working from home discrepancies in time recording .
21. He relied on an email of 1 December 2020 stating “I am presently suffering with my mental health which has been exacerbated over the last few months by my working relationship with MA, over the last week or so this has got to an unbearable point ... I suffered what I can only describe as an anxiety attack, I am not able to function under these conditions and I am presently seeking medical advice”. On 2 December 2020 another email was received saying “sorry to hear you are struggling with your mental health, please remember that support is available including our employee assistance programme”.
22. The claimant spoke to a doctor on 4 December however we did not have any medical notes from that appointment, this was a telephone consultation and it resulted in a fit note which described the claimant’s condition as 2mixed anxiety. and depressive disorder, stress”, the fit note said that the doctor did not need to see him again. However, he was signed as not fit until 3 January 2021.

23. The claimant actually saw the doctor in person again on 30 December 2020 and received a further fit note for two weeks absence – his condition was described as ‘ anxiety depression stress’. He advised the respondent he would be returning on the expiry of that fit note, which was 18 January, again the fit note did not say the doctor needed to see him again.
24. There was no entry for 4 December in the claimant’s medical notes but there was an entry for 30 December which stated “been struggling with low backpain since August, no trauma, no radiation, bowels, bladder, been doing some yoga, been cycling, struggles to run, saw osteopath thought disc problem, all muscular reassured, under huge amounts of stress from work, feels like being harassed even though off work. No previous issues with mental health, anxiety, has support, no thoughts of deliberate self-harm, no drug use, non-smoker, “ It noted that a fit note was issued not fit for work.
25. The claimant subsequently attended a disciplinary hearing on 22 January and as a result of that he was dismissed on 26 January The claimant appealed his dismissal and was advised on 18 February following a hearing that his appeal was unsuccessful. The claimant complained to HR about the situation and received a phone call from a member of HR, the claimant said he was led to believe that he would be reinstated however this did not transpire, some of these conversations may be without prejudice and therefore I do not refer to the contents any further.
26. The claimant was ordered to provide an Impact Statement and did so, the impact statement was devised on the basis of guidance on the internet. The impact statement says the claimant relies on depression, stress and anxiety disorder and states he was diagnosed in December 2020.
27. In respect of how his impairment affected him the claimant referred to changes to his job in April 2020 being turned into in effect a telesales role which did not suit him. Neither did working from home. He stated “I was off and unable to focus properly and taking longer to do normal simple tasks, I found myself having to do things over and over again, I was looking up information repeatedly as it wasn’t sinking in so this was just taking up more time. Later when I should have been sleeping my mind would just not switch off. I would lie away for hours, I even turned on the TV, but I couldn’t tell you what was actually on it, I couldn’t even concentrate on a book. I stopped looking after my appearance, didn’t shave or have my hair cut, my manager regularly commented on this. I wasn’t even taking care of how I dressed which is absolutely not how I am and is not acceptable. He said he tried really hard to appeal normal and happy, but he was really struggling inside as he had always been one of the “party people/proactive team member”, but “I felt like I was slowly using it”. He added that he also constantly worried, had anxiety over the past and future, was not able to look forward the way he used to and felt demotivated and defeatist. He advised he was taking antidepressants but had initially resisted taking antidepressants and only starting taking them in March after he had been dismissed.”
28. In respect of the claimant’s medical records the 4 December fit note said mixed anxiety and depressive disorder and stress;, on 30 December , it said anxiety, depression and stress.

29. The report submitted by Dr Henderson stated the following relevant matters. Dr Henderson firstly summarised the situation as he saw it from the documents that the claimant had no history of mental health problems prior to 2020, he was assessed by GP on 4 December and was given no treatment, was given a fit note with a diagnosis of mixed anxiety and depressive disorder and advised he was unfit for work for four weeks which was subsequently extended, that he returned to work on 18 January 2021, had a disciplinary three days later and was dismissed. He was diagnosed with a depressive illness in March 2021 and started treatment with antidepressants medication.
30. The doctor said he had seen nothing to make him disagree with the initial diagnosis of mixed anxiety and depressive disorder (ICD10 F41.2). This is a mild condition that is diagnosed where there are insufficient symptoms to support a diagnosis of either depression or an anxiety disorder. In his view at the date of the claimant's dismissal on the balance of probabilities the impact of this condition would not be described as substantial. He also stated during the material time that the expectation would be that the condition would resolve itself without treatment in a few months, certainly less than a year. In his view Mr Arundel subsequently became depressed outside of the material time.
31. The report goes on to note most of the matters that I have recorded above in the facts. Basically, the doctor summarised the claim form, the impact statement and the grounds of resistance. He then summarises the medical records, a fit note of 4 December he comments "this took place on 4 December, the condition is stated to be mixed anxiety and depressive disorder and stress, advised not fit for work no suggestion he might benefit from a phased return to work or any other adjustments and states the GP will not need to assess his fitness for work again at the end of the period. A second fit note dated 30 December the condition is reported to be anxiety, depression and stress advised again not fit for work no advice about possibly adjustments, fit note ends on 17 January, the GP states will not need to assess his fitness for work at the end of the period". After the dismissal there was an online consultation on 2 March where he first mentioned the blackout in November, a discussion about his back pain which he says has lasted longer than six weeks. Further online consultation on 23 March the claimant seeks help with his mental issues and back pain. In respect of the electronic GP records the matters discussed on 30 December are recounted however the doctor describes this as "the focus was on the claimant's back pain" and there were entries for 4 March and 26 March and 15 July 2021.
32. Dr Henderson's opinion was as follows. The report says at paragraph 64 "it is however apparent that for a number of months he may have been unhappy and somewhat disaffected:
- (a) there is information he struggled with his pain in his back;
 - (b) he is worried about the health of his mother falling at the start of the pandemic;
 - (c) there is a mention of a fall at home in either September or November;

- (d) he mentions some of some disagreements with his employer for example overpay.
33. He goes on to say “notwithstanding these difficulties Mr Arundel continued to attend work and was well enough to give a presentation to his colleagues about the stresses of working at home in lockdown, he sought no medical care either through his GP or elsewhere, as far as I can ascertain. Establishing a psychiatric diagnosis can present challenges that are less commonly seen in other areas of medicine where objective laboratory tests or scans are available, separating the illness from even severe but nonetheless normal experience is not straightforward. Such a process draws on a combination of biological psychological and social factors. Diagnosis should really only be made where the concept of psychiatric illness is required to explain the facts. Unhappiness, disappointment and irritability are all common and rarely require psychiatric illness to explain them”.
34. Dr Henderson continued “in my opinion there is no compelling combination of reported symptoms or complaint anywhere in the bundle to deviate from the diagnosis provided by Mr Arundel’s GP on his fit note which was mixed anxiety and depressive disorder which is defined as “this mixed category should be used when symptoms of both anxiety and depression are present but neither set of symptoms considered separately are sufficiently severe to justify diagnosis if severe anxiety is present with a lesser degree of depression one or other categories for anxiety or phobic disorders should be used, when both depressive and anxiety syndromes are present and severe enough to justify individual diagnosis both disorders should be recorded and this category should not be used. If for practical reasons of recording only one diagnosis can be made depression should be given precedence. Some autonomic symptoms (tremor, palpitations, dry mouth, stomach churning etc) must be present even if only intermittently, if any worry or over concern is present without autonomic symptoms this category should not be used, if symptoms that fulfil the criteria for this disorder occur in close association with significant life changes or stressful life events category F 43.2 adjustment disorders, should be used. Individuals with this mixture of comparatively mild symptoms are frequently seen in primary care but many more cases exist in the population at large which never come to medical or psychiatric attention and the GP on talking to the claimant had come to this conclusion that his symptoms came within this definition.
35. In respect of how long it had lasted the doctor said it is not possible to identify precisely when the impairment began, it is my opinion likely that across the period of the pandemic in keeping with many people Mr Arundel became less happy but there was nothing in the bundle that can tie the anxiety and depressive disorder to a particular event. It seems likely to me on the balance of probabilities that notice of disciplinary proceedings worsened his unhappiness although I have already stated that he was disaffected prior to this. It is not likely in my view that Mr Arundel would have been diagnosable with mixed anxiety and depressive disorder for more than one to two months prior to the eventual diagnosis on 4 December 2020. From other information he concludes that Mr Arundel became diagnosable depressed at some point in March 2021, but this was outside the material times.

36. In respect of day to day activities the doctor opined that mixed anxiety and depressive disorder is a mild condition relatively of little impact on normal day to day activities would be expected, there is some guidance in relation to ICD10 F32 “an individual with a mild depressive episode is usually distressed by the symptoms and has some difficulty in continuing with ordinary work and social activities but will probably not cease to function completely”. This disorder however is more severe than the disorder than the claimant was diagnosed with.
37. In the doctor’s view the claimant’s description of his anxiety and his symptoms was entirely in keeping with the diagnosis of mixed anxiety and depressive disorder. In his view the disorder whilst unpleasant would be insufficient to be identified as substantial bearing in mind the description of substantial. In respect of long term the doctor said there was very little research on mixed anxiety and depressive disorder and the statistics were in one study the authors found that 61% of patients with no significant psychiatric distress at three months and 69% had no significant psychiatric distress at twelve months therefore on the balance of probabilities it was likely his original condition would not have been regarded as long term. However he did say there was some limited research which suggested the disorder could be more serious than the word mild suggested but that more research was needed.. The claimant did not argue whether his condition was recurring therefore it was necessary not consider that issue.

Submissions

38. The respondents submitted that:-
- (i) the effects on the claimant of his impairment were not substantially adverse; and
 - (ii) that they had not lasted twelve months and were not likely to last for twelve months;
 - (iii) that the Tribunal could not take into account the evidence regarding what happened to the claimant after the relevant period which at the latest would be the appeal which was in February.
39. The respondents submitted Dr Henderson’s assessment was that the claimant had a mild disorder which would not have a substantial adverse effect on his day to day activities and was on balance and not likely to last for twelve months. The respondents submitted that the claimant’s difficulties with lockdown were very similar to difficulties a lot of people encountered during lockdown, difficulty in focusing, in concentrating, feeling low, possibly because of the lack of social contact etc. The claimant continued with his job and was off for a maximum of six weeks. It appeared that more severe symptoms only emerged after the phone call about the 23 November and the information that a disciplinary process would be put in place, whilst he had mentioned a number of things that were troubling him they were not substantial or adverse effect on day to day activities. Further, the claimant’s descriptions were insufficiently related to a time period to be reliable. The

statistics regarding whether a mild anxiety and depressive disorder would last for up to twelve months showed that it was only a 30% likelihood of that . The fact that the GP did not want to see the claimant again suggested the GP thought that the time off in the fit notes would be sufficient to resolve the issues.

Claimant's Submissions

40. The claimant was a litigant in person and his mother was acting for him. She made the following submissions:-
- (i) that the claimant's behaviour certainly had started changing by March 2020, that it should not be judged solely on the fact that he didn't seek medical help until December;
 - (ii) that the emails showed that he was struggling with his mental health throughout the pandemic period and that it did not just arise in December;
 - (iii) that she relied on paragraphs 3 and 4 in particular of the impact statement that referred to how the claimant felt at the time and paragraph 5, 6 and 7.
 - (iv) the fact that he had had a panic attack in November.
 - (v) that it could be predicted the claimant was going to be ill for over 12 months

Respondent's Reply

41. The respondent pointed to a number of things such as the claimant saying he hadn't had his hair cut or shaved during the pandemic which they said was quite typical of a number of people during the pandemic, along with a lack of concentration, organisation and generally feeling low because of the inability to meet people and socialise. Again, the respondent said this was the experience of many people during the pandemic/lockdown

Conclusions

Substantial Adverse Effect

42. Whilst the claimant attempted to persuade the Tribunal that his symptoms began before the start of the pandemic I do not find that he provided sufficient information to establish that he had more than normal feelings of insecurity etc as a result of some of his manager's comments ,particularly after he had enjoyed a period of approbation and promotion early on in his time with the respondent..

43. I accept that when the pandemic began the claimant's normal resilience was reduced as he was unable to do the exercise he normally do partly due to a back problem, (the claimant doesn't rely on this as a disability). He also was a very sociable person, and this caused him problems during the pandemic as socialising was barred for quite a long time. The claimant stated he stopped looking after his appearance and couldn't concentrate or focus and found it hard to get organised. Again, these are very common experiences during the pandemic, and these do not necessarily suggest a substantial adverse effect as a result of an impairment but just a normal reaction to the restrictions that most individuals were labouring under.
44. I do accept however that this started to get more embedded as time went on. In particular, the claimant's inability to sleep was a substantial adverse effect although the information provided was insufficient to establish exactly when his sleeping pattern was severely interrupted. The emails also show that the claimant was sharing the problems he was having with the respondent and whilst knowledge is not the issue here it was corroboration that he was feeling worse as time went on. The fact that he was willing to share it with people he did not know very well and did not like in terms of his manager, HR etc signifies that the claimant did feel things were moving out of the ordinary. Accordingly, I find by May 2020 the claimant was experiencing symptoms which had a substantial adverse effect on his day to day activities: Sleeping, concentration, temperament and self-care. The email from May substantiates this with the writer trying to 'jolly up' the claimant.
45. In addition. the fact the claimant did not see a doctor until December 2020 is not a signifier that he was not ill, it was extremely difficult to get an appointment with a doctor after March 2020 and also a lot of people were reluctant to do so, afraid of burdening the NHS. It is significant that the claimant's mother insisted that he see a doctor at this point following a panic attack, but panic attacks do not come out of the blue, particularly in someone who had no previous history of mental illness.
46. In addition, the fact that a lot of people grew their hair etc during lockdown does not indicate that there was no substantial adverse effect. It was for some a positive change of direction in circumstances where they did not have to go into work everyday, or a bit of a joke or experiment however with the claimant from the evidence he has given it was an indication of a lack of self-care. A man can shave, and it is not so difficult to have a homemade haircut and hide the worse effects of the same therefore not doing so where there was no positive perception involved supports the finding that he was losing the motivation to look after himself. This started at the beginning of lockdown and continued as is evident from the reference to his manager commenting yet still the claimant did nothing about it.
47. In respect of the claimant's sick notes taking Dr Henderson's views into account the 4 December diagnosis I accept is not a description of something alarming however we do not have the notes from that consultation Nevertheless in the absence of those notes I have taken the diagnosis in the context of Dr Henderson's expert advice, The GP in fact did not use the word "mild", that is what Dr Henderson advises mixed means in that neither

condition (anxiety nor depression) are serious enough for one or both to be stand-alone conditions he used “mixed anxiety and depressive disorder”

48. However I have also taken into account the emails and the conversations reflected in the emails which indicates the claimant feeling seriously disturbed as I have referred to above so that despite the suggestion that the 4 December diagnosis means that there was no substantial adverse effect by then I do not accept that viewing it in the context of all the information I have referred to above.
49. Whilst the GP has described it as mixed anxiety and depressive disorder the information provided by Dr Henderson also suggested that this could be a more serious disorder, he advised there was not enough research on it.. However, by 30 December the diagnosis is more fixed, and more details have been given to the doctor. I find this shows that the illness was escalating.
50. I have also taken into account that Dr Henderson has not examined the claimant and had he done so he would have elicited a great deal more information. That information may have assisted the respondent’s case or the claimant’s but there has to be a level of unreliability in the absence of a in person examination. However, it is I hope apparent that I have taken Dr Henderson’s report into account and have reasons for not accepting his conclusions in their entirety of which no in person examination is only one feature.
51. In addition, of course in deciding disability I have to look at the condition in the round.
52. There is no doubt that the adverse effects intensified after the conversation with his manager on 27 November and whilst this includes an element of adjustment or reactive symptoms there is no reason to suggest they were not a continuation of matters he was already experiencing.
53. The fact that the claimant was determined to go back to work does not detract from this and neither do I feel it was significant that the doctor did not want to see him again to the extent the respondent thinks it was significant. There is some significance in it but it does not mean that the claimant was not experiencing a substantial adverse effect or that on 18 January all these symptoms had disappeared, it shows that the claimant was simply attempting to get better and to get the disciplinary matters sorted out, of course it was highly predictable that his dismissal would exacerbate the claimant’s symptoms (that is not any indication regarding the fairness of his dismissal) as would his appeal failing.

12 months or likely to last for 12 months

54. The question is at the relevant time which appears to be from March 2020 to February 2021 was there a point when “it could very well happen that the claimant’s illness would last more than a year”. I find that it was likely to last for twelve months, bearing in mind that I have found the beginning of substantial adverse effect was May 2020 and there was no sign of any improvement in his emails to MA and others therefore it was persistent and

entrenched by July and at that point I find it reached the threshold of 'likely to last for 12 months' on the 'may well happen' test , I rely on the email exchanges to support this.

55. I have discounted the fact the claimant's mental illness did worsen from at least March 2021 and have placed myself in the period March 2020 to February 2021.
56. Accordingly, I find that the claimant was disabled from July 2020. This does not mean the respondent had the requisite knowledge that is an issue for the substantive hearing.
57. The claim now needs to be listed for a further Preliminary Hearing to determine the confidentiality issue ,to determine with more accuracy the claims and give orders for the substantive hearing

Employment Judge Feeney
30 December 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
14 February 2022

FOR THE TRIBUNAL OFFICE

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