



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Ms N Dowling

AND

Respondent

CPM United Kingdom Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT SOUTHAMPTON

ON

9 March 2022

EMPLOYMENT JUDGE GRAY

Representation

For the Claimant:

Mr G Probert (Counsel)

For the Respondent:

Did not attend and was not represented

JUDGMENT

UPON the Respondent failing to attend or be represented at this hearing,

AND UPON first considering the information available, the tribunal proceeded to hear the preliminary issue in the absence of the Respondent under Rule 47 of the Employment Tribunal Rules of Procedure 2013.

The judgment of the tribunal is that the Claimant is a disabled person within the meaning of the Equality Act 2010 at times material to this claim by reason of anxiety and depression.

JUDGMENT having been delivered orally on the 9 March 2022, and written reasons having been requested by email from the Respondent's representative dated 9 March 2022, in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and this hearing

1. This is the judgment following a preliminary hearing to determine whether the Claimant was a disabled person at the material times.
2. The hearing was listed to take place in person and start at 10AM.
3. By email timed at 10:09 the Employment Judge was sent the following information ... "For the hearing this morning for case 1400488/2021 - Nicola Dowling -vs- CPM United Kingdom Limited. The Respondent's Representative Mr Nigel Henry Croner Group Limited is delayed. He sends his apologies he may be sometime but he is trying to make it."
4. By 11:10 there was no sign of the Respondent's representative and no further update. The Claimant was ready to proceed so the hearing commenced at that time in the absence of the Respondent.

Background to the claim

5. This claim has been the subject of previous case management preliminary hearings and orders from hearings on the 14 July 2021 and on the 23 December 2021.
6. The most recent case management preliminary hearing was before Employment Judge Roper where this claim was relisted for a five-day full main hearing in Southampton from **6 February 2023**. It was confirmed at that case management preliminary hearing that the Complaint's complaints were for constructive unfair dismissal and disability discrimination, consisting of something arising and for a failure by the Respondent to make reasonable adjustments.
7. The issues relevant to the claim and case management to the final hearing were agreed at the previous hearing.
8. This preliminary hearing was listed to take place in person and determine whether the Claimant was a disabled person at times material to the claim be reason of the impairment of anxiety and depression.
9. For this hearing I was provided with a hard copy bundle and a PDF version consisting of 137 pages and an index page which included copies of the Claimant's medical records (at pages 71 to 137).
10. I was also provided with:

- a. The Claimant's impact statement.
 - b. Written submissions from Claimant's Counsel with copy authorities.
11. There was also on file an application by the Respondent for strike out and/or deposit order submitted on the 3 March 2022 which the Claimant objected to being determined at this hearing (by email dated 7 March 2022) and in the absence of the Respondent it was not possible to progress this aspect.
 12. Claimant's Counsel submitted that the dates for the period of complaint in this claim were between August 2019 to the resignation on the 11 January 2021. It was acknowledged that the Respondent has submitted a date range of February 2020 to December 2020 (see pages 68 and 69) as being the material time for her disability discrimination complaints.
 13. Evidence was heard from the Claimant and I then heard submissions from Claimant's Counsel in supplement to the written submissions already provided.
 14. I found the following relevant facts in relation to the preliminary issue proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary as presented to me on these issues, and after listening to the factual and legal submissions made by and on behalf of the Claimant on these issues.

The Facts

15. The Claimant was employed from a date in August 2010 to the 5 February 2021.
16. The Claimant contends that she is disabled by reason of mental impairments of anxiety and depression.
17. The Claimant says in her disability impact statement that she believes she is disabled because of her mental health condition, anxiety and depression.
18. The Claimant evidences that she has suffered from these conditions since 2001, saying she has had episodes in 2002, 2005, 2015 and again in December 2019.
19. I was referred to a letter addressed "To Whom It May Concern" from Dr Ruaux dated 6 February 2020 (see page 108 of the bundle) that records that the Claimant suffers with anxiety and depression and that her first episode was in 2001. It notes there has been no history of self-harm or

suicidal ideation. It says she has been treated with anti-depressants for periods of time. It says what her current medication was at that time.

20. Page 117 of the bundle notes Depression NOS – 17 October 2005, Chronic anxiety 7 December 2009, and Anxiety States in 13 October 2010 and 20 January 2012. Page 116 of the bundle notes, then Anxiety States – 11 September 2012.

21. The Claimant describes the impact on normal day to day life in paragraphs 6 to 12 of her impact statement (where there are two paragraphs 6):

“6. My mood can be frequently low. On days when I feel low, I am very teary. I lose interest in everything, I struggle to concentrate on even simple tasks, day to day life becomes difficult to manage, I constantly worry about everything, I feel I have been made to feel ashamed that I am gay, past comments and events play over in my mind like a video on repeat and I feel that everyone would be better off without me. The thought of being alone is awful and I become angry with myself for letting this destroy the person was. (Pages 82, 83,88)

6. My dark and negative thoughts can be all consuming. On bad days, they are constant. I believe I am a burden on everyone. I blame myself and feel everyone would be better off without me. In the past I have suffered from suicidal thoughts. (Pages 99,102,103)

7. My ability to concentrate is affected. When I am at my worst I feel as though I am walking in fog and my negative thoughts can dominate my concentration making it hard to focus on anything. I replay events in my mind, I have had hypnotherapy to help deal with this and been taught a technique to try to break this cycle.

8. My sleep is affected, I don't want to close my eyes because I replay events and have nightmares. If I do drift off to sleep, I wake suddenly gasping for breath and dripping in sweat. I average around 4 hours sleep a night, most days I feel exhausted and drained. (Pages 85, 88, 89, 90)

9. I lack confidence to drive and can become very anxious and stressed, I worry constantly about speeding and will replay the journey in my head. I only feel confident driving short journeys to familiar places. I haven't ridden my motorcycle in nearly 2 years due to lack of confidence and interest. Previously I loved driving and riding my motorcycle and was very confident and competent.

10. I rely heavily on my partner to deal with personal affairs and carryout household tasks and chores. When I am feeling unwell, I neglect eating and sometimes go all day without eating. My partner has to make sure I

eat, make calls for me and organises appointments, when I am feeling too overwhelmed to deal with personal affairs, I put off dealing with them. (Pages 85, 88,)

11. Before I became unwell, I enjoyed spending time with my family and visiting them in France. My illness has affected my ability to do things I enjoyed and to exercise because I am too exhausted and anxious. I struggle to communicate face to face and to look people in the eyes when speaking. (pages 87)

12. I have no interest in my appearance. I manage to care for my personal hygiene, but I lack so much confidence in my body and worry what people are thinking and constantly compare myself to years ago.”

22. The Claimant referred to GP entries at pages 88 (November and December 2019), 89 (October 2019) and 90 (October 2019) which correspond with what she says in evidence.

23. The Claimant also completed an e-consult form in August 2020, and it notes her with the condition Anxiety and Depression (see page 102).

24. The Claimant confirmed that this impact on day to day activities had also applied intermittently in her previous episodes, although it differed depending on the seriousness. She confirmed that she would have taken anti-depressants previously but could not recall the date and explained how they take a while to work and that she would use them alongside other treatments such as her regular appointments with her Social Prescribing link.

25. The Occupational Health Report dated 25 March 2020 (see pages 76 to 81) diagnosed reactive depression (see in particular page 78) and noted numerous symptoms which indicated “moderately severe depression”.

26. The Claimant was signed off work by her GP with a diagnosis of work related stress and remained off work completely from the 9 December 2019 to 4 February 2020, she then had a phased return which was to lead to a full time return on 17 March 2020 (see page 78). However, this was then interrupted by COVID and the furlough scheme (see page 67).

The Law

27. As set out in section 6 and schedule 1 of the Equality Act 2010 a person P has a disability if she has a physical or mental impairment that has a substantial and long-term adverse effect on P’s ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to

- last for at least 12 months or is likely to last the rest of the life of the person.
28. I was referred by Claimant's Counsel in his written submissions to a number of case authorities:
29. It is not necessary for a claimant to establish the cause of the alleged physical impairment (**Hospice of St Mary of Furness v Howard [2007] IRLR 944**).
30. It is permissible for a Tribunal to consider, first, whether the claimant's ability to carry out normal day-to-day activities is adversely affected and to consider the question of impairment in the light of those findings – see **J v DLA Piper UK LLP [2010] IRLR 936**.
31. In **Goodwin v The Patent Office [1999] IRLR 4**, the EAT held that the statutory definition of disability is concerned with a person's ability to carry out activities. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. The focus of the test is on the things that the applicant either cannot do or can only do with difficulty, rather than on the things that the person can do.
32. It is impermissible for an employment tribunal to seek to weigh what a claimant can do against what he or she cannot do, and then determine whether or not the claimant has a disability by weighing those matters in the balance - **Ahmed v Metroline Travel Limited (2011) UKEAT/0400/10, [2011] EqLR 464**.
33. In **Aderemi v London South Easter Railway Limited [2013] ICR 591**, Langstaff P said (paras.14-15): "Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other.... As a matter of first principle when considering the statute, this requires the focus of the Tribunal to be not upon that which a Claimant can do but that upon which he cannot do. It is what he cannot do that requires to be assessed, to see whether it is truly trivial and insubstantial or whether it is not."

34. When considering whether the impact is more than minor or trivial, 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] ICR 1522**, para.27. See also **Elliott v Dorset Council UKEAT/0197/20 (unreported, 9th April 2021)**.
35. In **Paterson**, the EAT considered that, in some cases, coping strategies will prevent the impairment having adverse effects, but only where they can be relied upon in all the circumstances – (per Elias P at 28).
36. In **Vicary v British Telecommunications plc [1999] IRLR 680**, per Morison J (at para 15) illustrates a potential pitfall for tribunals when considering the effect of mitigation.
37. There is an apparent overlap between the Guidance and the provisions of Sch.1(5) Equality Act 2010 and the concept of “deduced effects” (Goodwin). This provision is “far-reaching” and includes measures that treat or correct the adverse effect (**Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening) 2009 ICR 1056, HL**). In **Taylor v Ladbrokes Betting and Gaming Ltd [2017] IRLR 312**, “measures” are not confined to medical treatment only (para.12).
38. Although there must be a causal link between the impairment and a substantial and long-term adverse effect in the ability to carry out day-to-day activities, that causal link does not have to be direct. If, on the evidence, the impairment causes the substantial adverse effect on the claimant’s ability to carry out day-to-day activities, it is not material that there is an intermediate step between the impairment and its effect, provided there is a causal link between the two – **Sussex Partnership NHS FT v Norris [2012] EqLR 1068**.
39. The point for determining whether the effect of an impairment is likely to last for at least 12 months is the time of the decision or acts complained of. The tribunal should make its judgment on the basis of evidence as to the circumstances prevailing at the time of that decision (**Richmond Adult Community College v McDougall [2008] IRLR 227**).
40. In **All Answers Limited v W [2021] IRLR 612**, the Court of Appeal said that, whether the effect of an impairment is likely to last at least 12 months is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did or did not have last for 12 months.

41. In relation to recurring conditions, the leading case is **Swift v Chief Constable of Wiltshire Constabulary [2004] IRLR 540**, where the key question for the tribunal was whether the substantial adverse effect is likely to recur, not whether the illness is likely to recur.
42. In **Sullivan v Bury Street Capital Limited [2020] IRLR 980**, it was said to be “irrelevant” for the purposes of determining whether there was a disability, that the adverse effect later recurred. What matters is whether the available information at the earlier date was such that it could be said that a recurrence of the effect could well happen.
43. I was also referred to the assistance on the application of these tests given by the Equality and Human Rights’ Commission’s document ‘Equality Act 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability’. It was noted that at section A the guidance makes clear that the focus should be on the effect of the impairment rather than the underlying condition.
44. Reference was also made to the European genesis of these provisions, and that assistance may also be gained from the ECJ caselaw, which places the focus of the ‘day to day activities’ assessment on the claimant’s professional life. Reference was made to **Chacón Navas v Eurest Colectividades SA C-13/05, [2006] IRLR 706, [2007] All ER (EC) 59, ECJ**, ‘disability’ was held to cover those who have a ‘limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life’
45. From these submissions and the relevant law, the following key points are noted:
46. The burden of proving disability lies squarely on the Claimant.
47. From the definition from the Equality Act 2010, as referred to above, four essential questions need to be answered: (1) does a person have a physical or mental impairment? (2) does that have an adverse effect on their ability to carry out normal day to day activities? (3) is that effect substantial? (4) is that effect long-term? These questions may overlap to a certain degree; however, a tribunal considering the issue of disability should ensure that each step is considered separately and sequentially: **Goodwin**.
48. An impairment will only amount to a disability if it has a substantial adverse effect on the individual’s ability to carry out day-to-day activities which are normal. Whether an effect is substantial requires a

consideration whether it is more than minor or trivial: section 212 Equality Act 2010.

49. Paragraph. 2(1), Schedule. 1, Equality Act 2010 states that an impairment will have a long-term effect only if: (1) it has lasted at least 12 months; (2) the period for which it lasts is likely to be 12 months; or (3) it is likely to last for the rest of the life of the person affected.
50. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out day-to-day activities, it is to be treated as having that effect if it is likely to recur (paragraph 2(2), Schedule.1, Equality Act 2010).
51. In respect of the meaning of the word 'likely' as used in the above context, this means whether something "could well do" or "could well happen".
52. Also, considering the Guidance on the definition of disability (2011) about recurring or fluctuating effects which states that the effects are to be treated as long term if they are likely to recur beyond 12 months after the first occurrence (see paragraph C6).

The Decision

53. Does the asserted impairment of anxiety and depression amount to a disability within the meaning of the Equality Act 2010?
54. With regard to the particular facts of this case I am mindful that the time at which to assess the disability (i.e. whether there is an impairment which has a substantial adverse effect on normal day-to-day activities) is the date of the alleged discriminatory acts. This is also the material time when determining whether the impairment has a long-term effect.
55. Considering the statutory provisions and the four questions as set out in **Goodwin**; (1) does a person have a physical or mental impairment? (2) does that have an adverse effect on their ability to carry out normal day to day activities? (3) is that effect substantial? (4) is that effect long-term?, I find as follows:
56. The Claimant suffers with anxiety and depression and had her first episode in 2001.
57. Then to consider how impaired the Claimant was in her normal day to day activities (was it substantial – that is more than minor or trivial) and if so, when did that impairment substantially adversely affect her?
58. I find that the Claimant is substantially adversely affected by anxiety and depression. I accept the uncontested evidence of the Claimant about

these matters which is supported by her GP records. The Claimant was in contact with her GP in October 2019 and is signed off work from the end of 2019 to March 2020.

59. Finding that a Claimant is substantially adversely affected by her impairment is not itself enough, that effect needs to be long term. That is, it needs to have lasted at least 12 months; or the period for which it lasts is likely to be 12 months; or it is likely to last for the rest of the life of the person affected. This must be judged as at the date of the alleged discriminatory behaviour. In this case the Claimant asserts this to be August 2019 to February 2021. The Respondent asserts it as a period of February 2020 to December 2020. Considering the Respondent's position this is not a period of 12 months. Therefore, the issue in this case based on the Respondent's assertions is whether the Claimant's impairment has a substantial adverse effect on her normal day to day activities which is likely to (or could well) last for 12 months, as judged by what was known up to December 2020.
60. The Claimant also relies upon her periods of anxiety and depression since 2001. Reference to some of the different periods are also referenced in the Claimant's medical notes.
61. The period between the periods of anxiety and depression is more than 12 months so with reference to the Guidance on the definition of disability this will satisfy the requirements of the definition of disability in respect of the meaning of 'long-term' because the adverse effects have recurred beyond 12 months after the first occurrence and are therefore treated as having continued for the whole period.
62. Even if I am wrong in that considering the material dates of discrimination as asserted by the Respondent are February 2020 to December 2020, I accept that at that point the period for which that particular period lasts is likely to be 12 months or more. There is no evidence presented that the Claimant was by December 2020 on a positive trajectory to mean she was no longer likely to be impaired. Also, for the reason of the previous recorded anxiety and depression from 2001, it can also be said at that point that it is something that is likely to recur, even if it were not long term or likely to be at that point.
63. For those reasons my finding is that the Claimant has satisfied the definition of having a disability within the meaning of the Equality Act 2010 at the material times to this claim, by reason of **anxiety and depression**.
64. In conclusion, it is the judgment of the tribunal that the Claimant is a disabled person within the meaning of the Equality Act 2010 at times material to this claim by reason of anxiety and depression.

65. The Claimant indicated she would apply for costs related to this hearing. The Claimant was directed to apply in writing to give the Respondent opportunity to respond to the application about which it would have no notice as it was not a matter indicated as being applied for prior to this hearing and the Respondent did not attend this hearing.

Employment Judge Gray
Dated 23 March 2022

Judgment sent to parties: 7 April 2022

FOR THE TRIBUNAL OFFICE