



EMPLOYMENT TRIBUNALS

Claimant: Mr M Davies
Respondent: Environtec Ltd

Heard at: Cardiff (by CVP) **On:** 12 April 2022

Before: Employment Judge R Brace

Appearances

For the Claimant: In person
For the Respondent: Ms S Firth (Counsel)

JUDGMENT

It is the decision of the Employment Judge sitting alone that the Claimant was not a disabled person by reason of either his anxiety and/or asthma at the relevant time i.e. from 14 September 2020 to 11 April 2021.

Written Reasons

1. As the Claimant's specific disability discrimination claims had yet to be identified by the Tribunal at case management, there was a preliminary discussion prior to hearing evidence, as to what were the dates of the alleged discriminatory acts for the purposes of the determining when the Claimant was a disabled person pursuant to s6 Equality Act 2010 ("EqA 2010").
2. It was agreed by both parties that:
 - a. the earliest date that the Claimant was alleging he had been subjected to discrimination was when the Welsh Government introduced rules that all Welsh residents were required to wear face coverings in indoor public spaces; and

- b. the latest that the Claimant was alleging that he had been subjected to an act of discrimination, was 11 April 2021, being the date that the Claimant resigned from employment.
3. It was agreed that these were the relevant dates for determining whether the Claimant is a disabled person under s.6 Equality Act 2010.
4. I had before me an agreed bundle of some 150 pages (the "Bundle"). References to pages in that Bundle are denoted by [] in these written reasons. The Claimant's Disability Impact Statement [96] and amended Impact Statement [101] were also included in that Bundle.
5. I also had a statement from Mr David Atherton, Regional Operations Manager for the Respondent, which was relied upon by him. The Claimant had provided to the Tribunal and to the Respondent what he referred to as his formal response to that statement plus supporting information.
6. Inclusion of such documents [151-154], my viewing of a short video clip and listening to a short audio clip, into the Bundle was also permitted with the consent of the Respondent.
7. Both witnesses were asked questions by the opposing party and by the Tribunal and both parties had the opportunity to sum up.
8. The hearing as conducted by CVP with little connection issue.

Facts

9. The Claimant, a 35 year old male. He claims that he is a disabled person by reason of severe asthma and anxiety (Disability Impact Statement [96]).
10. The Claimant commenced employment with the Respondent in February 2017, as an Asbestos Surveyor, a role that routinely required him to wear a protective Ori-nasal P3 face mask for short periods when undertaking sampling activities on asbestos surveys.
11. The Claimant signed an Employment Health Screening Questionnaire on commencement of employment [116] confirming its accuracy in which he indicated that he had no problems with certain functions including the following;
 - a. Mobility – e.g. walking, using stairs;
 - b. Physical exertion e.g. lifting, carrying, running;
 - c. Communication e.g. speech
12. He also confirmed that he had never required special arrangements at work to accommodate a disability or health problem and was not taking any medication. He did not consider that he had a disability or health condition for which he may require support.

13. When that Claimant signed that form on 20 February 2017, it was accurate and he was satisfied that he had withheld no information from the Respondent. The Claimant confirmed this on cross-examination.
14. From 26 March 2020, the Claimant was placed on furlough as part of the Government's Coronavirus Job Retention Scheme and returned to work on 27 July 2020. On 14 September 2020, the Welsh Government introduced the mandatory use of face coverings in public places and the Claimant asserts in his Disability Impact Statement that his anxiety occurred soon after the Respondent implemented a face covering policy in August 2020.
15. I found that it was more likely than not that the Respondent's face covering policy commenced on or around 14 September 2020 following the Welsh Government's rules on the wearing of facemasks and not August 2020.
16. On 3 February 2021, an incident arose in the workplace resulting in an investigation into the Claimant's conduct. Following a disciplinary hearing, the Claimant was issued with a final written warning. He subsequently appealed that outcome and submitted a grievance but, pending an appeal hearing on both, on 11 April 2021, the Claimant resigned.
17. In relation to the impairments relied on I made the following findings of fact on the basis of a balance of probabilities.
18. The Claimant was diagnosed with asthma in childhood. He asserts he was first diagnosed with an anxiety disorder in January 2018 and that his anxiety resulted in increased levels of stress, sometimes heightened fatigue and a speech impediment/stammer in certain circumstances. The Claimant further asserts that these conditions were exacerbated when he had been obligated to use a cloth face covering during the Covid-19 pandemic and that the conditions went '*hand in hand, the anxiety caused asthma attacks, the face covering and visor created a feeling of claustrophobia which triggered an Asthma attack and subsequent heightened anxiety levels*'.
19. He confirmed that he stopped using a cloth face covering in late September/October 2020 but that the visor also increased his levels of anxiety and asthma. He does not assert that the wearing of a cloth face covering and/or visor was a 'normal day to day activity'.

Asthma

20. In relation to his asthma, the Claimant had stated in his Amended Impact Statement [101] that he could become wheezy when walking up a set of stairs, but gave no indication of how often or when this had ever happened to him.
21. More reliable evidence was given by him on cross examination, evidence which I accepted, that his asthma would be worse during strenuous exercise, such as playing rugby or running, during seasonal variations, such as when the pollen count was high, and if he suffered a chest infection.

22. During certain periods, such as when he had a chest infection, the Claimant would be prescribed additional steroids such as Prednisolone. Such an episode arose in December 2015 [114] when he was prescribed additional medication to deal with the symptoms when suffering with such an illness.
23. In his witness statement, the Claimant asserted that he controlled his asthma via two inhalers which he said he used daily:
- a. a blue inhaler, which applied medication as a 'reliever', to relieve the symptoms of asthma such as coughing or wheezing and feeling breathless; and
 - b. a brown inhaler, which applied medication as a 'preventative', to prevent the symptoms of asthma.
24. On cross examination however the Claimant admitted that he had only rarely used his brown preventative medication and that he had only chosen to routinely use his brown pump as a preventative since February 2020 i.e. when Covid-19 started as a pandemic, as a precautionary measure.
25. This live evidence was supported by the GP records for the Claimant [115-107], which also reflected that only the blue inhaler had been prescribed routinely to the Claimant from 2014 and then to be used only when required.
26. Whilst in his disability impact statement, the Claimant referred to 'severe' asthma, I concluded that if the Claimant suffered from severe asthma:
- a. he would more likely than not have referred to this in the medical questionnaire he completed at the commencement of employment. He did not;
 - b. he would have been more heavily reliant on preventative medication. The Claimant had not used preventative medication during adulthood and gave evidence that he had not been using such medication; and
 - c. the Claimant's GP records would have supported that statement. They did not.
27. As a result, I did not accept the Claimant's evidence, contained in his Disability Impact Statement, in which he asserted that if he had not taken any treatment he *'would simply not have been able to breath and carry out simple tasks such as carrying shopping or carrying out my work commitments without the medication for Asthma during the last 18 months'* [99] or that he could become wheezy when climbing stairs, as credible.
28. I was not satisfied that the Claimant had proven that he did have such difficulties with carrying out such day to day activities. I did not find that the Claimant proven that he lived with severe asthma, rather he had chronic asthma from a child which was not severe and that he managed with relievers at times of infection or when the fungal or pollen count was high.

29. The Claimant asserted that his chest had 'severely weakened' during strenuous exercise. I accepted that evidence but found that the Claimant had not established that there had been any other effect on his day to day activities

Anxiety

30. The Claimant had first visited his GP in January 2016, following a period of anxiety and depression, when he was prescribed 56 capsules of 20mg of Fluoxetine [114], just over a month worth of anti-depressant medication. Repeat prescriptions were provided to the Claimant but, by May 2016, some 4 months later, he failed to collect his prescription having ceased to take such medication, at the latest, at that point.

31. The Claimant attended his GP again in August 2016 and again in October 2016, when on both occasions he was again prescribed a course of anti-depressants.

32. By November 2016, the medical evidence indicates and the Claimant confirmed in cross examination, that the Claimant had ceased taking any anti-depressant medication.

33. The total period of time in 2016 that the Claimant had been on medication was therefore 10 months and, even during this period, the Claimant took the medication sporadically and only at '*his lowest points*' as he termed it, when domestic issues were challenging such as when he moved to live with family in Reading.

34. The Claimant was challenged on cross examination, that even without medication the effects on the Claimant's life had been minimal. The Claimant responded that this was not true as '*social anxiety prevented [him] from doing lots of things*'. He did not expand on this further however when answering and had not included this within his witness statement.

35. Whilst I accepted that the Claimant had suffered a period of anxiety during 2016, I did not find that it had a severe adverse effect on his day to day activity of social interaction, particularly in the context of the Claimant confirming that he played in a team sport of rugby and without any further evidence from the Claimant.

36. The Claimant provided no evidence on what other day to day activity had been impacted.

37. The Claimant appears to have a 'flare up' of anxiety in August 2018, as reflected in the GP record of 28 August 2018 [108] where he had symptoms of panic and was again prescribed a short course of anti-depressants. The Claimant did not continue with that medication and there were no repeat prescriptions. It reduced to manageable levels without medication with the Claimant adopting a healthy lifestyle with exercise, yoga, saunas and meditation and by September 2018 he was reporting as only having anxiety 'on occasion'.

38. The Claimant did not attend his GP practice again, regarding any anxiety, until 9 February 2021 advising that he had been under a lot of stress at work [137].
39. The GP notes reflect the issue as 'Stress at work' and, as a result, I found that the Claimant had recounted to his GP in that consultation that he had been accused of coughing deliberately in the direction of his manager, which he had denied, and felt he had been 'witch hunted in work' and that he was suffering panic attacks at night.
40. A further telephone consultation took place on 4 March 2021 [136].
41. Again, on the basis that the GP notes reflect as much, I found that he reported to his GP that he was suffering panic attacks and that he felt like he was '*suffering with PTSD as a result of an episode at work*'.
42. The notes further reflect that he discussed his ongoing grievance. The GP comment was that the physical symptoms he was experiencing was likely a manifestation of anxiety and was prescribed anti depressants for a short period. He was advised to book an asthma review if he had concerns regarding asthma. No evidence was before me to find whether or not the Claimant did make such a review.
43. Whilst the Claimant had given evidence that a symptom of his recent anxiety was involuntary tics and a stammer or speech impediment, he gave no indication that these conditions in themselves had any impact on any normal day to day activity, whether communicating or otherwise. I accept that it is more likely than not would have caused him some embarrassment but save for a statement that it caused social anxiety, there was no evidence of a practical adverse effect on any normal day to day activity of socialising.
44. The Claimant also alluded to post-traumatic stress. This was not a condition that he was relying on to demonstrate that he was a disabled person and there was no medical evidence to support such a diagnosis. I therefore make no findings in relation to this.

Disability - Law

45. The Equality Act 2010 ("EqA") provides that a person has a disability if he or she has a 'physical or mental impairment' which has a 'substantial and long term adverse effect' on his or her 'ability to carry out normal day to day activities'.
46. Supplementary provisions for determining whether a person has a disability is contained in Part 1 Sch 1 EqA which essentially raises four questions:
- a. Does the person have a physical or mental impairment?
 - b. Does that impairment have an adverse effect on their ability to carry out normal day to day activities?

- c. Is that effect substantial?
- d. Is that effect long term?

47. Although these questions overlap to a certain degree, when considering the question of disability, a Tribunal should ensure that each step is considered separately and sequentially (Goodwin v Patent Office [1999] IRLR (EAT)).

48. In Goodwin Morison P, giving the decision of this Court, also set out very helpful guidance as to the Tribunal's approach with regard to the determination of the issue of disability. At paragraph 22 he said:

“The tribunal should bear in mind that with social legislation of this kind, a purposive approach to construction should be adopted. The language should be construed in a way which gives effect to the stated or presumed intention of Parliament, but with due regard to the ordinary and natural meaning of the words in question.”

49. The EqA 2010 Guidance states;

‘In general, day to day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities’ (D3).

50. The EqA 2010 Guidance (D3) indicates that normal day-to-day activities can include ‘general work. The EAT in Paterson v Commissioner of Police of the Metropolis [2007] IRLR 763 concluded that ‘normal day-to-day activities’ must be interpreted as including activities relevant to professional life. It emphasized that the phrase is to be given a broad definition that can include irregular but predictable activities that occur in professional life.

51. Furthermore, a non-exhaustive list of how the effects of an impairment might manifest themselves in relation to these capacities, is contained in the Appendix to the Guidance on matters to be taken into account in determining questions relating to the definition of disability. Whilst the Guidance does not impose any legal obligations in itself, tribunals must take account of it where they consider it to be relevant.

Substantial

52. The requirement that the adverse effect on normal day to day activities should be considered a substantial one is a relatively low threshold. A substantial effect is one that is more than minor or trivial (s.212 EqA and B2 Guidance).

Effect of Treatment

53. Para 5 Sch. 1 Part 1 EqA provides that an impairment is treated as having a substantial adverse effect on the ability of the person to carry out normal

day to day activities if measures, including medical treatment, are being taken to treat or correct it and, but for that, it would likely to be the effect.

54. In this context, likely is interpreted as meaning 'could well happen'. The practical effect is that the impairment should be treated as having the effect that it would have without the treatment in question (B12 Guidance).
55. Measures envisaged by para 5 include in particular medical treatment and whilst medical treatment is not defined the EAT in Kapadia v London Borough of Lambeth held that medical treatment can include counselling.
56. In determining the effects of an impairment without medication, the EAT has stated that: *'The tribunal will wish to examine how the claimant's abilities had actually been affected at the material time, whilst on medication, and then to address their minds to the difficult question as to the effects which they think there would have been but for the medication: the deduced effects. The question is then whether the actual and deduced effects on the claimant's abilities to carry out normal day-to-day activities [are] clearly more than trivial'* — Goodwin

Long Term

57. The question of whether the effect is long term is defined in Sch. 1 Part 2 as
- a. Lasting 12 months;
 - b. likely to last 12 months;
 - c. likely to last the rest of the person's life.
58. Again, the Guidance at C3 confirms that in this context 'likely' should be interpreted as meaning it could well happen.
59. The Guidance (C4) also clarifies that in assessing likelihood of the effect lasting 12 months, account should be taken of the circumstances at the time of the alleged discrimination. Anything which took place after will not be relevant in assessing likelihood.

Effect of treatment

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Burden of Proof

64. Finally, the burden of proof is on the claimant to show she or she satisfied this definition. 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 act (*Cruickshank v VAW Motorcast Ltd* 2002 ICR 729, EAT).

65. This is also the material time when determining whether the impairment has a long-term effect

Submissions

66. The Respondent's representative reminded me of the Guidance on matters to be taken into account and in particular B7 which was that if a person can reasonably be expected to use coping mechanisms that can render them non-disabled.

67. She also referred to:

- a. **Latchman v Reed Business Information Ltd** [2002] ICR 1453 on the issue of whether the effect was long term, in terms of 'likely to be at least 12 months' in that likelihood falls to be judged as it was, or would have seemed to have been, at the point when the discriminatory behaviour occurred;
- b. **Royal Bank of Scotland plc v Morris** 2012 WL 608851, submitting that it was very important for the Claimant to adduce evidence that the effect would be likely to last 12 months and that the EAT suggested expert evidence was often required; and
- c. **Herry v Dudley Metropolitan Council** 2016 WL 08944683, (in particular paragraph 56) submitting that what the Claimant was experiencing during the relevant period was an adverse reaction to work circumstances.

68. The Claimant submitted that his asthma and anxiety were separate issues and suggested that he had PTSD and that social anxiety caused him the most problems. He relied on a tic, which he indicated was a physical indicator of when he has PTSD and that this had made him suffer social anxiety in the last 12 months and embarrassment.

69. He submitted that individually his asthma and anxiety were weak ailments problems arose when together his anxiety could bring on an inability to breathe.

Conclusions

70. Whilst I accepted that the Claimant had suffered from chronic asthma since childhood, I did not find that he had proven that he suffered from severe asthma. Had this been the case, I concluded that it was more likely than not that the Claimant would have been heavily dependent on preventative medication and would have answered in the medical questionnaire, in February 2017, that he had such health problems. He did not and admitted that he had no such issues when he signed that form. It followed that it brought into doubt how candid the Claimant was in his evidence and in turn how candid he had been about the effect of his asthma on his day to day activities.

71. Whilst the Claimant had given evidence that he was sometimes wheezy when climbing stairs or playing with his children, this was at odds with his evidence that he had only started taking preventative medication at the start of the pandemic. On balance I found it more likely than not that the Claimant did not have significant symptoms of asthma and that the asthma that he did live with did not have an adverse impact on his normal day to day activities.

- a. I did not accept the Claimant's evidence in relation to climbing stairs/playing with his children was impacted;
- b. I did not accept that any adverse effect the Claimant's asthma had on his engagement with strenuous sport such as playing a game of rugby, a contact sport, would fall within the definition of a 'normal' day to day activity, particularly when read in conjunction with the examples of factors that it would be reasonable to regard set out in the Appendix to the Guidance.
- c. Whilst I accepted the Claimant's evidence that his asthma did flare up during periods of chest infections, high pollen rate and exercise, I also was persuaded by the Respondent's arguments that it was more likely than not that any breathing issues the Claimant experienced with the face coverings, had been triggered by his anxiety and not his asthma.

72. I accepted that the Claimant's condition was long term and likely to be a recurring impairment but I was not persuaded that the Claimant had demonstrated that the chronic asthma that he suffered had a substantial adverse impact on his normal day to day activities.

73. Having accepted that the Claimant did take his blue medication sometimes three times a week when the condition was exacerbated, I then considered what the deduced effects would have been without the reliever medication.

74. I accepted that it was more likely than not that a bout of difficulty with breathing/tight chest would take longer to recover from if the blue medication were not taken, but I did not consider that I had any medical evidence to demonstrate that the Claimant would have suffered any more of a substantial impact without it.
75. On that basis, I did not consider that the Claimant's asthma had a long term substantial effect on his normal day to day activities and concluded that the Claimant was not disabled by reason of his asthma alone.

Anxiety

76. Whilst I accepted that the Claimant had had two brief periods of anxiety in 2016, and had taken medication in that period, I concluded that I had little evidence of the:
- a. impact that this had on his day to day activities at that time, or
 - b. that the impact had lasted 12 months in that period; or
 - c. could be said to be likely to last 12 months at that time or indeed even likely to recur.
77. I also found that the Claimant had implemented low level coping mechanisms that many people apply to daily stress of life, to manage any anxiety he felt, including yoga and exercise. I accepted the Respondent's argument that such an approach fitted into the concept of a coping or avoidance strategy which rendered any effect of the anxiety on the Claimant's day to day activities as not substantial from 2016 in any event.
78. Whilst the Claimant has given evidence that the trigger for his anxiety in late 2020/2021 was the obligation to wear a face covering in work, the Claimant did not seek assistance for his anxiety until February 2021.
79. I concluded that it was more likely than not that had the Claimant's anxiety started in September 2020, with the introduction of the mandatory face covering, he would have sought assistance from his GP. He did not. Rather he did not attend his GP until February 2020.
80. If the GP records had not reflected that the Claimant had complained of his work related problems, I *might* have been persuaded that the Claimant's anxiety had been triggered by the mask wearing, and had in turn commenced back in September 2020. However I found that the Claimant had reported to the GP stress at work and related it to the dispute that was ongoing at that time. There was no focus on general mask wearing albeit mentioned.
81. On that basis, I concluded that any anxiety symptoms, including panic attacks and lack of sleep, were more likely than not because the Claimant had reacted to the incident in February 2020, which escalated to a disciplinary action against him and in turn grievance from him.

82. As such, it followed that I concluded that these symptoms of anxiety did not commence until February 2021.
83. Apart from the lack of sleep, the Claimant did not persuade me that at this time, there was any other effect on any other day to day activity, whether in isolation or in conjunction with his asthma.
84. Whilst the Claimant had mentioned that he suffered social anxiety, this was said in broad terms and I was not satisfied that the Claimant had demonstrated a substantial adverse impact on the normal day to day activity of social communication or interaction from February 2021 to April 2021.
85. I was therefore not persuaded that the anxiety had any substantial adverse effect on the Claimant's normal day to day activities.
86. Even if I could have been persuaded that the impact on the Claimant's day to day activity of sleep or social interaction, I could not be persuaded that there was sufficient evidence to satisfy the 'more than minor or trivial' threshold of what is 'substantial'.
87. Further and more significantly, I was not persuaded that it could be said that any such effect was likely to have lasted 12 months at that point in time.
88. I was not persuaded on the evidence before me that the Claimant had demonstrated that what he was experiencing at that time was anything more than a stress reaction to the work situation, emanating from the February 2020 incident, and leading to the Claimant's disciplinary and his subsequent grievance.
89. The evidence, in particular the GP notes reflecting that the Claimant had not in the period between September 2020 to February 2021 attended his GP with concerns regarding his anxiety, led me to conclude that the cause of his symptoms was in fact a reaction to the dispute in work and was not likely to have lasted 12 months at 11 April 2020.
90. I have no medical evidence before me to suggest otherwise and on that basis I found that even if the Claimant had established that his anxiety at that time had a substantial adverse effect on his normal day to day activities, I would not have been persuaded that such effects were likely to last 12 months or indeed that it was likely to recur.
91. I therefore concluded that the Claimant was not a disabled person by reason of his anxiety, either in isolation or in conjunction with the effects of his asthma.

Case Number: 1600711/2021

Dated: 22 April 2022

JUDGMENT SENT TO THE PARTIES ON 3 May 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

Mr N Roche