Case No: 2410367/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr L Willetts

Respondent: Toy Fight Limited

Heard at: Manchester Employment Tribunal (by CVP)

On: 22 April 2022

Before: Employment Judge Mark Butler

Representation
Claimant: Ms A Pitt (of Counsel)
Respondent: Ms A Niaz-Dickinson (of Counsel)

JUDGMENT

1. The claim for unfair dismissal is dismissed on withdrawal. The claimant having withdrawn this complaint by email dated 24 January 2022

2. The claimant has not satisfied the tribunal that he has a disability pursuant to section 6 of the Equality Act 2010. His claims for disability discrimination are struck out in their entirety.

3. There are no outstanding claims in this case. The final hearing dates of 25, 26 and 27 January 2023 are vacated.

Ms Pitt applied for written reasons at the conclusion of the oral judgment. These are those written reasons.

REASONS

Introduction

1. Employment Judge Aspinall, at a case management hearing in 13 December 2021, listed this case for a preliminary hearing to be held in public to determine 'whether the claimant was a disabled person within the meaning of the Equality Act 2010 at all or any time relevant to the claims

made'. In this case, the claimant relies on the impairment of work-related stress, mixed anxiety and depression as a disability.

2. For the purposes of today I had a file of documents that ran to 449 pages. Within that file there was a witness statement produced on behalf of the claimant, and one produced on behalf of Mrs Willetts, who is the claimant's wife.

3. Ms Niaz-Dickinson made me aware from the outset that she would unlikely have any questions for Mrs Willetts, as her witness statement covered much the same ground as that of the claimants.

4. In reaching this decision I took account of the file of documents, the witness statements and the oral evidence of the claimant. I was assisted by closing submissions by Ms Niaz-Dickinson on behalf of the respondent, which supplemented her skeleton argument, and oral submissions made by Ms Pitt on behalf of the claimant.

5. I was informed at the outset of the hearing by Ms Pitt that Mrs Willetts had her baby with her, who was only 11 days old. And that the claimant and Mrs Willetts were having to use their baby's room to conduct the hearing. The hearing was conducted flexibly with this in mind, especially as there may be occasions where the baby would need to feed.

<u>Issues</u>

6. Was the claimant's mental impairment, namely work-related stress, mixed anxiety and depression, a disability within the meaning of the Equality Act 2010 at all or any time relevant to the claims made.

7. The relevant times for the purpose of this issue is from 24 February 2021 to 15 April 2021.

<u>Law</u>

8. Section 6 of the Equality Act (2010) ("EqA (2010)") states:

> (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.
> >
> > …

9. Schedule 1 of the EqA (2010) states:

> Section 6
>
> Part 1 Determination of Disability

Impairment

1

Regulations may make provision for a condition of a prescribed description to be, or not to be, an impairment.

Long-term effects

2

(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.

(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.

10. Guidance issued under section 6(5) of the Equality Act 2010, or more specifically the *Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability* provides the following:

Meaning of 'likely'

C3. The meaning of 'likely' is relevant when determining:

• whether an impairment has a long-term effect (Sch1, Para 2(1), see also paragraph C1);

• whether an impairment has a recurring effect (Sch1, Para 2(2), see also paragraphs C5 to C11);

• whether adverse effects of a progressive condition will become substantial (Sch1, Para 8, see also paragraphs B18 to B23); or

• how an impairment should be treated for the purposes of the Act when the effects of that impairment are controlled or corrected by treatment or behaviour (Sch1, Para 5(1), see also paragraphs B7 to B17).

In these contexts, 'likely', should be interpreted as meaning that it could well happen.

C4. In assessing the likelihood of an effect lasting for 12 months,

account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age).

11. Ms Niaz-Dickinson cited the following relevant authorities in her closing submissions. Ms Pitt did not dispute the legal position as set out by Ms Niaz-Dickinson in her closing submissions:

    a. Morgan v Staffordshire University [2011] EAT/0322/00, in which the EAT provided the following guidance on the question of whether a mental impairment qualifies as a disability under the EqA (2010). At paragraph 20 of the Judgment Lindsay J stated as follows:

    > *(1) Advisers to parties claiming mental impairment must bear in mind that the onus on a claimant under the DDA is on him to prove that impairment on the conventional balance of probabilities.*
    >
    > *(2) There is no good ground for expecting the Tribunal members (or Employment Appeal Tribunal members) to have anything more than a layman's rudimentary familiarity with psychiatric classification. Things therefore need to be spelled out. What it is that needs to be spelled out depends upon which of the 3 or 4 routes we described earlier in our para 9 is attempted. It is unwise for claimants not clearly to identify in good time before the hearing exactly what is the impairment they say is relevant and for Respondents to indicate whether impairment is an issue and why it is. It is equally unwise for Tribunals not to insist that both sides should do so. Only if that is done can the parties be clear as to what has to be proved or rebutted, in medical terms, at the hearing.*
    >
    > *(3) … In any case where a dispute as to such impairment is likely, the well-advised claimant will thus equip himself, if he can, with a writing from a suitably qualified medical practitioner that indicates the grounds upon which the practitioner has become able to speak as to the claimant's condition and which in terms clearly diagnoses either an illness specified in the WHOICD (saying which) or, alternatively, diagnoses some other clinically well-recognised mental illness or the result thereof, identifying it specifically and (in this alternative case) giving his grounds for asserting that, despite its absence from the WHOICD (if such is the case), it is nonetheless to be accepted as a clinically well-recognised illness or as the result of one.*
    >
    > *(4) … When a dispute is likely a bare statement that does no more than identifying the illness is unlikely to dispel doubt nor focus expert evidence on what will prove to be the area in dispute.*

(5) This summary we give is not to be taken to require a full Consultant Psychiatrist's report in every case. There will be many cases where the illness is sufficiently marked for the claimant's GP by letter to prove it in terms which satisfy the DDA. Whilst the question of what are or are not "day-to-day activities" within the DDA is not a matter for medical evidence – Vicary v British Telecommunication plc [1999] IRLR 680 EAT, the existence or not of a mental impairment is very much a matter for qualified and informed medical opinion. Whoever deposes, it will be prudent for the specific requirements of the Act to be drawn to the deponent's attention.

(6) If it becomes clear, despite a GP's letter or other initially available indication, that impairment is to be disputed on technical medical grounds then thought will need to be given to further expert evidence, as to which see de Keyser v Wilson [2001] IRLR 324 at p 330.

…

(8) The dangers of the Tribunal forming a view on "mental impairment" from the way the claimant gives evidence on the day cannot be over-stated. Aside from the risk of undetected, or suspected but non-existent, play-acting by the claimant and that the date of the hearing itself will seldom be a date as at which the presence of the impairment will need to be proved or disproved, Tribunal members will need to remind themselves that few mental illnesses are such that their symptoms are obvious all the time and that they have no training or, as is likely, expertise, in the detection of real or simulated psychiatric disorders.

(9) The Tribunals are not inquisitorial bodies charged with a duty to see to the procurement of adequate medical evidence – see Rugamer v Sony Music Entertainment UK Ltd [2001] IRLR 644 at para 47. But that is not to say that the Tribunal does not have its normal discretion to consider adjournment in an appropriate case, which may be more than usually likely to be found where a claimant is not only in person but (whether to the extent of disability or not) suffers some mental weakness.

b. Royal Bank of Scotland plc v Morris [2012] UKEAT/0436/10/MAA, in which Underhill J provided further guidance on the assessment of mental impairments under the Equality Act 2010:

[63] We accordingly hold that it was not open to the tribunal on the evidence before it to find that the Claimant was disabled during the relevant period. It might well be that the Claimant could have filled the evidential gap by agreeing to the suggestion made during the case management process that expert evidence be sought which directly addressed the

questions which the contemporary reports did not cover. But he made a deliberate – and perfectly rational – choice not to do so: see para 55 above. The fact is that while in the case of other kinds of impairment the contemporary medical notes or reports may, even if they are not explicitly addressed to the issues arising under the Act, give a tribunal a sufficient evidential basis to make common-sense findings, in cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance. It may be a pity that that is so, but it is inescapable given the real difficulties of assessing in the case of mental impairment issues such as likely duration, deduced effect and risk of recurrence which arise directly from the way the statute is drafted.

c. J v DLA Piper LLP [2010] UKEAT/0263/09/RN, where Underhill J (whilst President of the EAT) gave guidance on the the distinction between clinical depression and a reaction to adverse life events:

> *[42] The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at para 33(3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness – or, if you prefer, a mental condition – which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or – if the jargon may be forgiven – "adverse life events". (But NB that "clinical" depression may also be triggered by adverse circumstances or events, so that the distinction cannot be neatly characterised as being between cases where the symptoms can be shown to be caused/triggered by adverse circumstances or events and cases where they cannot.) We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians – it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod and Dr Gill in this case – and which should in principle be recognised for the purposes of the Act. 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 most laypeople, 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 the context of a claim under the Act. This is*

because of the long-term effect requirement. If, as we recommend at para 40(2) above, a tribunal starts by considering the adverse effect 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 twelve 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.

12. Ms Niaz-Dickinson also referred me to chapter 6.143-6.146 of the IDS handbook 'Discrimination at work, which I read in full. This is concerned with what iss meant by 'likely to last 12 months' for the purposes of disability under the Equality Act 2010. This made reference to various cases, including, amongst others:

    a. <u>Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening)</u> 2009 ICR 1056, HL, in which Baroness Hale defined the term 'likely' as meaning something that 'could well happen'.

    b. J<u>obling v Corporate Medical Management Ltd</u> EAT 0703/01, where medical evidence was important.

<u>Findings of Fact and discussion</u>

Where findings of fact are made this has been done based on the balance of probability from the evidence I have read, seen, and heard. Where there is reference to certain aspects of the evidence that have assisted me in making my findings of fact this is not indicative that no other evidence has been considered. My findings were based on all of the evidence and these are merely indicators of some of the evidence considered in order to try to assist the parties understand why I made the findings that I did.

I do not make findings in relation to all matters in dispute but only on matters that I consider relevant and necessary to deciding on the issues currently before me. With that in mind, my focus was on whether any such impairment was likely to last more than 12 months.

13. The impairment in question started to affect the claimant from 24 February 2021. Although there does appear to be some dispute on this, with the claimant in his oral evidence suggesting that the impairment started from an earlier date, the evidence when considered as a whole suggested that the correct date from which to assess the long term aspect of impairment was from 24 February 2021. Included in this analysis is that 24 February 2021 was the date given to EJ Aspinall by Ms Pitt, when representing the claimant at the Preliminary Hearing that took place on 13 December 2021 (see p.32). And there has been no attempt to rectify this by the claimant since that record was sent to the parties, and so it must be considered to be accurate. Further, the claimant has given no evidence of how he says he was being affected by his impairment before 24 February 2021: his witness statement is quiet on the affects he says his mental impairment was having on him before the 24 February 2021 and he gave no

explanation under cross examination. At its height, the claimant's witness statement provides details of matters before that date (see paragraphs 7 to 18 of the claimant's witness statement), but does not provide any indication of how any such impairment was affecting him on a day to day basis across these dates. Instead, this provides a narrative of issues he was having in his life and working life. From this I conclude that the impairment started to affect the claimant, on his own case, from around 24 February 2021.

14. I do note that the claimant's witness statement does address some matters relating to day to day activities from para 42 onwards; however, these appear to relate to matters post-dismissal, and therefore post 07 April 2021. I reach this conclusion given that paragraph 42 spells out that it is since dismissal that he has struggled to move on from this experience. And in paragraph 44 there is reference to 'since his depression has become severe', which ties in with his dismissal when reading the Cognitive Behavioural Psychotherapy assessment report from 01 September 2021 (pp.426-430). And this appears in the part of the claimant's witness statement when he was addressing the period around his dismissal. Therefore it is plausible to read that these paragraphs all relate to the period around and after 07 April 2021,and does not affect the finding above.

15. Even, if I was wrong on the date on which the claimant's impairment started to affect him, then the date would have been found to be 19 January 2021, by virtue of paragraph 23 and 24 of Mrs Willetts's witness statement. This would not have altered the overall conclusion in this case. As, whichever of the dates used, the same initial conclusion is reached and that is that any substantial adverse affects on the claimant's day to day activities, if it reached that level, had not yet continued for at least 12 months. The question for this tribunal is therefore whether the claimant's mental impairment was likely to last more than 12 months, as assessed at the material time.

16. I remind myself that I cannot take into account events after 15 April 2021, in helping me determine whether the claimant's impairment at the time was likely to last more than 12 months. And further, I remind myself that the test is one of asking whether the evidence at that time supports that the impairment could well have lasted for at least 12 months.

17. The claimant was examined by his GP practice on a number of occasions, and there is nothing that supports that the impairment in question could well last for up to 12 months. Not only do the observations of the medical practitioners who examined the claimant at the time suggest that the impairment would be short term, but their actions also suggest it too. These are considered further below.

18. On 24 February 2021, after examination, the claimant was not given a sick note, but it was recorded that he would take 1 week absent from work through self-certifying. The claimant indicated that he would also self-refer to counselling. An appointment for a review was made for the following week. It must have been expected at this time that the matter that the claimant presented with was likely to resolve itself in the short-term, and hopefully within a week. There is nothing in the medical record to suggest

otherwise.

19. On 03 March 2021, the claimant again attended at his GP practice. He explained to his GP, and it was recorded that he was 'feeling a little brighter'. The claimant requested a sick note form the doctor, who issued one for a period of 2 weeks. Given the way the claimant was now presenting having been away from the workplace, his condition was still being considered to be a matter that was a short-term matter. His doctor was viewing this as something that would resolve itself within 2 weeks from the date of this appointment. Again, the impairment that the clamant was presenting with at his GP surgery, given the period of time of the sick note, and the way the clamant was presenting himself and his improvement at this point, was thus being viewed as one that would resolve itself over a short period of time. And it was not likely at this point to last for 12 months.

20. On 08 March 2021, the claimant presented at his GP surgery and was recorded as having had a good weekend. The plan was for a follow up meeting in 2 weeks' time.

21. On 17 March 2021, as part of the claimant's depression interim review, the claimant again attended at his GP surgery. In this appointment it was recorded that the claimant was now feeling much better, that he had found the calm app very helpful and that he had a back to work meeting the following day, which he was anxious about. At this appointment the claimant had shown clear signs of improvement. There is no evidence that the impairment was likely to last more than 12 months.

22. The claimant returned to work on 18 March 2021. The claimant had improved sufficiently to enable him to return to work.

23. The claimant attended at his GP surgery on the 22 March 2021. At this appointment it was agreed between the claimant and his doctor that his frequency of attending at his GP's office could be reduced from this appointment. And it is recorded that the claimant, even though having returned to work, was feeling more balanced and better able to cope. It was agreed that if the claimant felt his mood slip or he needed further support then he could contact the GP's office. There is no evidence presented that at this date the impairment in question was likely to have a substantial adverse impact on his normal day to day activities for at least 12 months. To the contrary, the evidence suggests that matters were improving, if not resolved at this point.

24. On 31 March 2021, the claimant presented at his GP surgery. At this appointment, the claimant was signed off work on a sick note for 2 weeks. He felt that was unable to go back to work at that moment. This was due to his work being questioned by management. Given that the claimant was only signed off for two weeks, and given that the claimant's impairment improved significantly when he was away from the workplace previously, the impact of the claimant's impairment was expected to be resolved relatively short term, and within 2 weeks. This was in line with what had happened previously when the claimant presented with similar symptoms.

25. 06 April 2021, the claimant attends a GP appointment again. The claimant

agrees to trial medication. At this appointment the claimant also explained that he would contact CBT. However, there is nothing that supports that this could well last for many months to come.

26. On 09 April 2021, the claimant was assessed by Insight Therapy, following a self-referral by the claimant. - after the claimant self-referred himself (see p.224). The claimant was given six session of CBT. The first session was due on 13 April 2021, with the final session due to take place on 03 August 2021. Again, given the period of time that this covers, this is only evidence of the impairment affecting the claimant in the short term, and up to and including 03 August 2021. There is nothing to suggest that the impairment would continue to have a substantial adverse affect on the claimant beyond 03 August 2021.

27. The claimant's final attendance at his GP's office in the material time took place on 12 April 2021. It is recorded that the claimant is continuing with his medication and was awaiting a CBT appointment. The claimant was to have a follow up appointment at his GP one week later. There is nothing to suggest in the record of this appointment that the impairment was now being considered long-term. Rather, the record of the appointment is still suggestive that the claimant's diagnosis, when looked at objectively, was a matter that would resolve itself in the short term rather than the long term. And this is unsurprising that this is against the background that the claimant was a relatively young and healthy adult, with no history of mental health issues prior to this episode. And that the claimant on discussing with his GP had presented his impairment as a clear reaction to events in his life, that he explained to the his GP had eased when he was away from the workplace.

Conclusions

28. Ms Pitt in her closing submissions sought to rely on two pieces of evidence to support a finding that the claimant had an impairment that was likely to last more than 12 months. However, to consider these in assessing the question of 'likely to last 12 months' would be an error of law. The two pieces of evidence were as follows:

    a. A Cognitive Behavioural Psychotherapy Assessment Report, dated 01 September 2021 (at p.426 of the bundle). Ms Pitt made the submission that people can start off with functioning depression, and then this can change. And that is what has happened with the claimant, and that this report supports such a finding. I do not question that idea, and it is clearly the case that one can start off with functional depression and this can then change into something more serious. However, this report is evidence after the period in question. And so cannot be taken into account in deciding whether the claimant had an impairment substantially affecting his normal day to day activities that was likely to last at least 12 months. Secondly, the content of the report does not assist the claimant in any event. In short, it provides little in terms of addressing impacts on the claimant's on normal day to day activities at the relevant times.

b. A GP letter dated 02 March 2022 (at p.438 of the bundle). Similar to that noted above, this is evidence that was created after the period in question, and therefore cannot be considered. But there are similar limitations of this document as that expressed in relation to the Report above. At its height it says the claimant had some impairment since around June 2020, but it gives no indication beyond the doctor and GPs notes and the claimant's evidence on the impact on day-today activities, from which the 12 month period or likelihood of lasting 12 months could be assessed.

29. I conclude that the claimant has not satisfied the Tribunal that his mental impairment was likely to last at least 12 months. The evidence during the material period, that being 25 February 2021 to 15 April 2021 (or even if taken from January 2021), when assessed objectively, suggest that the impairment would resolve itself within a short period of time, and most likely within a matter of months at most, if not weeks.

30. The 23/24 February appears to be a tipping point for the claimant, where whatever impairment the claimant had, it had started to affect his normal day to day activities substantially. However, as expressed above, all of the evidence at the time supports that this was a short-term matter, and was not likely to last in total 12 months or more. And this continued to be the case through to at least 15 April 2021, which is the final date that I am concerned with. And this is my decision when these effects are viewed through the lens of what was known at that time, which is what the tribunal must do.

31. The material/evidence does not support that impairment was likely to last 12 months, and therefore the claimant is found not to have had a disability pursuant to s.6 of the Equality Act 2010 at the material time. His disability discrimination claims must be dismissed.

32. It is unfortunate that this matter has not resolved itself in the way that the evidence suggests it was expected to and it appears to have worsened. And for that Mr Willetts has my sympathy. However, the continuing effects, and how that impairment has played out and continues to affect him after the material period is something which I cannot take into account. To do so would be to fall into an error of law.

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Employment Judge Mark Butler

Date: 23 May 2022

JUDGMENT SENT TO THE PARTIES ON

1 June 2022

FOR THE TRIBUNAL OFFICE

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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