



EMPLOYMENT TRIBUNALS

Claimant: Mr K Watt
Respondent: CPS Group (UK) Limited

Heard at: Cardiff (by CVP) **On:** 22 July 2022

Before: Employment Judge **R Brace**

Appearances

For the Claimant: Mr D Stephenson (Counsel)
For the Respondent: Mr R Dunn (Counsel)

JUDGMENT

It is the decision of the Employment Judge sitting alone that at the material times the Claimant:

1. was a disabled person by reason of his asthma; but
2. was not a disabled person by reason of his depression and anxiety.

Written Reasons

Introduction and Background

1. On 26 January 2022, at a case management preliminary hearing, Employment Judge Cawthray, listed a public preliminary hearing on the issue of whether the Claimant was a disabled person.
2. The parties have prepared an agreed bundle of documents (the 'Bundle'), which had been sent in electronically to the Tribunal in advance of the CVP preliminary hearing (the "Bundle") The Bundle contained neither the pleadings nor the case management orders, but these were available to me from the Tribunal file.
3. I was provided with an Impact Statement and an amended Impact Statement. The Respondent did not object to the Claimant relying on his

amended Impact Statement and the Claimant was given permission to rely on it.

4. The parties confirmed that it was agreed that the material time, for determining whether the Claimant was a disabled person within the meaning of s.6 Equality Act 2010 ("EqA 2010"), was the period from early September 2020 to 23 December 2020, when the Claimant's employment terminated.
5. There was a short adjournment whilst the parties tried to obtain some Fit Notes, Fit Notes that it appeared that neither party had disclosed to each other despite them existing and potentially being relevant and in both parties' possession at some point. These additional documents were added to the Bundle. References to pages in the 244 page bundle are indicated by [] in these written reasons.
6. The Claimant contends that he is a disabled person for the purposes of s.6 and Schedule 1 Equality Act 2010 ("EqA 2010") by reason of a:
 - a. Physical impairment – severe asthma; and
 - b. Mental impairment – anxiety and depression.
7. He says cumulatively and individually, these impairments have a substantial and long-term effect on his normal day to day activities.
8. The Respondent admits the Claimant suffered from both impairments and also admits that:
 - a. the Claimant suffered a physical impairment of asthma long term, but that the Claimant was required to prove a substantial adverse impact on his day to day activities during the material time.
 - b. the Claimant suffered a mental impairment from 12 October 2020, but asserts that the Claimant has not proven that it had a substantial adverse impact on day to day activities during the material time and/or that the impact was long term.
9. Both the Claimant and Respondent representatives relied on detailed written submissions and these have been incorporated into these written reasons by reference. I do not propose to repeat those submissions within these written reasons.

Disability - Law

10. The Equality Act 201 ("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'.
11. 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?
12. 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)).
13. 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.”*
14. 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).*
15. 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.
16. 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.
17. 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).

18. 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. 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).
19. 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
20. 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.
21. Again, the Guidance at C3 confirms that in this context 'likely' should be interpreted as meaning it could well happen.
22. 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.
23. 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). This is also the material time when determining whether the impairment has a long-term effect

Facts and Conclusions

24. The Claimant was born on 23 October 1984 and was 35 years' old, turning 36 years old in the October of 2020, at the material times.
25. The Claimant was employed by the Respondent as Group Client Relationship Manager from July 2008 until 23 December 2020, when he resigned with immediate effect.

Asthma

26. The Claimant's medical records indicated, and I accepted, that he had been diagnosed with asthma in January 1994, when he was 9 years' old and as a child between 11 years' old and 14 years' old had required hospital treatment for his asthma.
27. Whilst I accepted that the Claimant was likely to have had repeated hospitalisation when a young child, there was no evidence before me that, in the period between being 14 years' old until 2018, the Claimant had required hospital treatment. I did find however that he had been admitted to hospital in October 2018 following an exacerbation of his asthma condition [15].
28. From May 2014, the Claimant's asthma had been subject to regular reviews at his GP practice and from that date the Claimant had routine prescriptions to relieve his asthma (Ventolin/Salbutamol). In addition to his existing reliever medication, GP records from 7 May 2014 [17], following an acute exacerbation of asthma and use of a Ventolin reliever in the week prior to the appointment, demonstrate that the Claimant was advised to make an appointment with the asthma nurse with the GP recommending that the Claimant needed also to be taking an asthma preventer, Seretide, regularly.
29. Throughout 2014-2018, the Claimant's asthma appears to have been well-controlled with his reliever medication, with just one flare up per year:
 - a. In 2015, he reported that his asthma was not preventing him exercising or sleeping or giving him daytime symptoms [16] GP -entry 29 December 2015.
 - b. In October 2016, the Claimant reported that he had suffered some breathlessness when suffering a cold which affected his asthma [16];
 - c. In January 2018, he attended his GP practice due to a cough and breathing issues and restarted his preventer medication, Seretide, indicating that at some point the Claimant had ceased having repeat prescriptions for that particular preventer medication. He reported in February 2018 that his asthma was not limiting his activities [29];
30. In October 2018 the Claimant was admitted to hospital following an asthma attack, and was prescribed painkillers due to chest pain and requested a Tramadol prescription from his GP. Whilst the Claimant had asserted in his witness statement that he had been prescribed morphine and Tramadol to alleviate his asthma symptoms, the GP records indicate that, save for that episode in October 2018, such pain relief had not been prescribed in relation to the Claimant's asthma more generally, but was prescribed in relation to other physical conditions, in particular recurrent back-pain.
31. The Claimant does not appear to have attended his GP for asthma related matters throughout 2019.
32. There was also no indication in the GP records that the Claimant attended his GP more regularly from Feb/March 2020 regarding his asthma following

the commencement of the Covid-19 pandemic. The medical records reflect and I found that the Claimant continued to receive his routine medication throughout 2020 and that he reported to his GP in September 2020 that his asthma was not disturbing his sleep or limiting his activities unless he had a chest infection when he would use his reliever a lot [29].

33. The Claimant gave evidence that he had a stress induced panic attack due to pressure at work on 30 September 2020. The GP medical notes reflect that the Claimant attended his GP on 1 October 2020, following what was referred to 'stress at work', further reflecting that at that time the Claimant reported to his GP, issues at work including his recent return to work and a grievance that he had submitted [14]. Within those notes, the GP has recorded that the Claimant reported that he had suffered a severe panic attack the previous night and had called 999.
34. The entry for 1 October 2020 makes no reference to an asthma attack, and I concluded that if the Claimant had suffered an asthma attack, this would have been recorded. It was not, and I found that on balance of probabilities the Claimant had a panic attack on 30 September 2020, rather than an asthma attack as when he reported to his GP the following day, the only asthma discussion the Claimant had with his GP was that he considered his employers were being very difficult with him regarding his asthma to the point that he felt he needed to bring a formal grievance against them.
35. On 15 October 2020, the Claimant telephoned his GP practice explaining that he had been buying his reliever inhalers during lockdown and that he had been using his son's asthma control medication inhalers twice a day in the past few days. He was advised to take the correct dosage when his symptoms might then improve.
36. The Claimant does not appear to have attended his GP for asthma related matters after that date until after his employment terminated on 23 December 2020.
37. I was therefore not satisfied that during the period September 2020 to 23 December 2020 that the Claimant had demonstrated that with medication, his asthma had any impact on his normal day to day activities and was not persuaded that there was any evidence before me to indicate that the stress he had faced through work, had exacerbated his asthma in that period.

Medication and deduced effects

38. I then turned to the issue of deduced effects and the impact of both the reliever and preventer medication taking into account para 5 Sch.1 Part 1 EqA 2010, which 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, were being taken to treat or correct it and, but for that, it would be likely to be the effect. In that context, I considered that likely is interpreted as meaning 'could well happen' and concluded that they could.

39. The Claimant gave evidence, which I also accepted, that his asthma has been managed with that medication, but that when he was under pressure or feeling stressed, his asthma caused him to struggle to breathe and induced an 'asthma attack', when he experienced extreme shortness of breath and chest pain, symptoms of the disease. I also accepted the Claimant's evidence that during times when there was no obvious repeat prescription for his medication, he was either using old inhalers, inhalers prescribed to family members and/or had been purchasing the reliever medication over the counter and that from September 2020 the Claimant was taking both a preventer steroid, twice a day, as well as using his reliever medication. I therefore concluded that throughout the material time the Claimant was on medication for his asthma.
40. The Claimant gave evidence in his Impact Statement that without his asthma medication, he would '*significantly struggle to carry out normal day to day activities as the most basic life skills: breathing, walking, running, dressing or cooking*'. He also gave live evidence that due to the compromise of his lung capacity, if he did not take his inhalers he would be unable to do basic tasks. He explained that he had come off medication prior to an appointment with a thoracic clinician and that he found that he could not even undertake basic tasks without his medication, clarifying that this included climbing stairs, walking even cooking on a stove. I accepted that evidence.
41. I was therefore satisfied that there was evidence before me of the effect of the asthma on the Claimant's ability to carry out normal day to day activities without that medication. I was further satisfied that the impact was adverse and substantial, taking account the low threshold of what is 'substantial'.
42. I therefore concluded that at the material time the Claimant had the physical impairment of asthma, that whilst such an impairment did not have an adverse impact on his day to day activities when taking medication, when considering the deduced effects I was persuaded that the Claimant's asthma was a physical impairment that adversely affected his ability to carry out day to day activities that were more than merely trivial and were long term.
43. The Claimant was a disabled person at the material times by reason of his asthma.

Anxiety and Depression

44. The Claimant gave live evidence, on some limited examination in chief that I permitted, that from late September/early October 2020, he started to experience the symptoms of anxiety and depression including those set out in §31 Impact Statement, and that the impact that some of those symptoms had on his day to day activities, that he had set out in §34 Impact Statement, had also started in September and October 2020. He did then

qualify that answer by indicating that he started to have sleeplessness from March 2020, due to worry at that time about the Covid-19 pandemic.

45. This was again addressed on cross-examination, when the Claimant gave evidence that his anxiety and depression started in October 2020. He again qualified that answer:
- a. by saying that he was anxious before then due to the actions of the Respondent and that from late September 2020, these conditions started to impact on his day to day activities and was linked to stress he was experiencing at work; and
 - b. again immediately by saying that the impact commenced in mid-September 2020.
46. As a result of the entries in the GP records from 1 October 2020 point until the termination of the Claimant's employment on 23 December 2020, I found that the Claimant attended his GP to discuss his mental health on four further occasions:
- a. On 12 October 2020, when he again spoke of issues with stress at work and that he was feeling depressed, that he had put in his grievance and was struggling to sleep. The notes support the Claimant's evidence that at this time he was referred to MIND and that he was started on a course of anti-depressants. At this point the Claimant was diagnosed as suffering from anxiety with depression. No prognosis was given but the Claimant in live evidence confirmed, and I found, that the GP had advised him at that point that often people were unable to feel better or to start to recover until the aggravating situation, in the Claimant's case the actions of the Respondent;
 - b. On 22 October 2020, when again the Claimant discussed his stress at work and his grievance, when the Claimant was advised that to attend his grievance hearing as the notes reflect that the GP told the Claimant that it was *'prob best to go ahead as prolonging without resolution was not helpful either,*
 - c. On 6 November 2020, the Claimant again spoke to his GP regarding his ongoing stress at work and raising concerns that the anti-depressant that had been prescribed to him were insufficient; and
 - d. On 16 November 2020 the Claimant as seen by a primary care mental health gateway worker on a telephone consultation where again the Claimant spoke of his ongoing situation at work causing him stress and anxiety and was provided with a referral to MIND for counselling.
47. The final entries prior to his resignation were what appeared telephone consultations in December 2020 when the Claimant spoke regard his stress at work and was looking for a letter that he was meant to be shielding in order to show the Respondent[14]. On 11 December 2020, the Claimant's GP practice wrote to the Claimant confirming that the Claimant was in the

vulnerable group of patients who they encouraged to work from home in response from Welsh Government Covid-19 guidance as a result of the Claimant's asthma [60].

48. Whilst I accepted that from March 2020, the Claimant was feeling a level of anxiety about the impact of Covid-19 on his health in particular, I was not persuaded however that the symptoms that he described in either §31 or §34 of his Impact Statement, had started at that point.
49. I found that the Claimant started to experience some symptoms of his stress and anxiety from late September 2020 and, by the time of his diagnosis on 12 October 2020, was experiencing the symptoms he described at §31 and §34 of his Impact Statement, §34 of the Claimant's Impact Statement appearing to be a hybrid of symptoms and impact of those symptoms on normal day to activities.
50. I was not persuaded that these symptoms only developed after the Claimant had left employment. This was despite the Claimant confirming that he had had described both symptoms and impact of those symptoms at the time he drafted his Impact Statement in November 2021, and despite the Impact Statement on one reading appearing as though on a chronological basis these symptoms did not appear until after April and/or November 2021. I accepted his evidence which was that these had in fact started in 2020 during his employment.
51. I was also not persuaded that the impact on the Claimant's day to day activities were only those he had articulated to his GP as reflected in his GP records, effectively only of being upset in front of his child. I found the Claimant credible when he spoke in live evidence of his embarrassment and confusion at being in such a mental health and emotional position and found it difficult to express all the symptoms to his GP. I also accepted that GPs do not necessarily record every symptom a patient tells them that they experience.
52. I also accepted his evidence how he felt 'crushed', how he could not function to the extent that he could not get out of bed at times and how he was unable to concentrate, unable to exercise and how his sleeping had been impacted every night and that whilst there were days when he had relied from such symptoms, this would only be respite for a day or so before they would return.
53. I therefore found that the symptoms, as described by the Claimant in §31 and §34 Impact Statement, commenced late September / early October 2020. I also found that the impact that such symptoms had on his normal day to day activities also commenced at this point in time and included an impact on normal day to day activities of:
 - a. Getting up from bed and getting dressed because of low motivation and symptoms of his anxiety and depression;

- b. Having difficulty in taking part in normal interaction including social interaction;
 - c. Difficulty in concentrating;
54. These had been described by the Claimant on cross-examination and I accepted that live evidence.
55. I was therefore satisfied that the Claimant's anxiety and depression and symptoms flowing from those impairments had an adverse impact on the Claimant's day to day activities in that regard, that this had commenced in late September/early October 2020 and had continued up to the point his employment terminated on 23 December 2020.
56. I was satisfied that those effects on his day to day activities were substantial and again, in coming to this conclusion I took into account that the threshold of what is substantial is low; it is more than minor or trivial.
57. The final question was more difficult, namely whether the effects were long term.
58. In evidence, the Claimant accepted that his symptoms from his anxiety and depression were linked to the Respondent's actions and his ongoing grievance. The Claimant also accepted that he thought that he would start to recover when he had the grievance outcome. This was reflected in the email he had sent to the Respondent on 30 October 2020 [238]. He again qualified his evidence, indicating that was a '*figure of speech*' and that his view was predicated on the basis that the Respondent was going to be truthful and get to the '*root of the grievance*'. He did accept however and I found that as at 30 October, the Claimant himself believed he would recover when he had the outcome of the grievance.
59. The Claimant received the outcome of his grievance appeal and whilst I make no specific findings on the exact date that the Claimant became aware of the outcome, the Claimant resigned on 23 December 2020 after receiving the outcome of that appeal. Again, he hoped that his symptoms on resignation would improve as he would then be out of what he considered a '*toxic environment*'.
60. As the Claimant had been suffering the effects for less than three months at the date of termination, I had to look forward from that date to assess whether I considered the adverse effect at that time was likely to last at least 12 months or recur. I reminded myself that likelihood is not something to be determined with the benefit of hindsight (**Parnaby v Leicester City Council** UKEAT/0025/19)
61. I was not persuaded that the Claimant had proven that his impairment of anxiety and depression was long term as at 23 December 2010 for the following reasons:
- a. The Claimant had no history of such impairments;

- b. There was little to no medical prognosis in the period leading up to 23 December 2020; and
 - c. throughout the Claimant reported a connection between his stress at work and ancillary grievance, and his symptoms.
62. On that basis, it was my conclusion that it could not be said that the mental health impairment was likely to have had a long term adverse effect on his normal day to day activities.
63. In those circumstances I concluded that the Claimant had not met the definition of a disabled person by reason of his anxiety and/or his depression and that claim is dismissed.

Employment Judge RL Brace

11 August 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 16 August 2022

FOR EMPLOYMENT TRIBUNALS Mr N Roche