



EMPLOYMENT TRIBUNALS

Claimant: Mr Jonathan Franklin

Respondent: Mitra Innovation Ltd

Heard at: Watford (in public; by CVP video hearing) **On:** 3 November 2022

Before: Employment Judge Skehan (sitting alone)

Appearances

For the claimant: Mr Johnson (McKenzie Friend)

For the respondent: Mr Baran (Counsel)

RESERVED JUDGMENT

- (1) The claimant did not at the material time have a disability as defined within section 6 of the Equality Act 2010.
- (2) The claimant's claims for disability discrimination are unsuccessful and dismissed.

REASONS

- (3) The open preliminary hearing was listed to consider:
 - (i) whether the claimant was at the material time (mainly November 2019 to 23 April 2020) a disabled person in accordance with section 6 of the Equality Act 2010 by reason of the combined impairment of asthma and anxiety.
- (4) It was common ground that the only claims remaining in this litigation related to disability discrimination requiring the claimant to have a disability at the material time as defined within the Equality Act 2010.

The relevant law

- (5) The definition of disability can be found in section 6 of the Equality Act 2010. A person has a disability if they have a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. "Substantial" means "more than minor or trivial".
- (6) The relevant parts of Schedule 1 of the Equality Act provides:

- (i) 2(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.
 - (ii) 5.(1) an impairment it to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if-
 - a. measures are being taken to treat or correct it and
 - b. but for that, it would be likely to have that effect.
- (7) I was referred to the case of Goodwin v Patent Office [1999] IRLR 4, that reminds the tribunal that the focus of attention should be on the things the claimant either cannot do or can only do with difficulty, rather than on the things that they can do (at para 35). Further, the Tribunal should consider the four 'conditions' set out by the definition (at para 25 onwards): and while Tribunals may find it helpful to address each of the questions but at the same time be aware of the risk that disaggregation should not take one's eye off the whole picture (at para 30).
- (8) The case of Ginn v Tesco Stores Ltd [2005] UKAEA/0197/05/MAA provides that: where there are two or more impairments, the combined effect must be considered.
- (9) The case of J v DLA Piper UK LLP [2010] IRLR 936, provides:
- (i) It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in Goodwin (at para 40);
 - (ii) however, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings
 - (iii) there is a proper distinction to be made between mental illness producing symptoms of low mood and anxiety, and a reaction to adverse circumstances or 'adverse life events', such as problems at work (at para 41-45, and the discussions of 'Clinical Depression').
- (10) The case of Royal Bank of Scotland plc v Morris [2012] UKAEA/0436/10/MMA provides that:
- (i) the burden of proving disability lies on the claimant;
 - (ii) the issue of whether an episode of mental ill health satisfies the long-term condition – is likely to continue for at least a year - is the kind of question on which a tribunal is very unlikely to be able to make safe findings without the benefit of medical evidence;
 - (iii) 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 the Tribunal to make findings without expert assistance. This 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.

The evidence

- (11) I was provided with an agreed bundle stretching to 136 pages together with a witness statement from Mr Fraser Bell. The claimant gave evidence by reference to his impact statement and Mr Bell give evidence by reference to his witness statement. Both witnesses were cross-examined. Both parties made oral submissions. I was also provided with written submissions by Mr Baran. Unfortunately, I did not have sufficient time to provide a decision on the disability issue during the hearing, requiring the decision to be reserved.
- (12) The material time with which I am concerned is between 11 November 2019 and 1 April 2020, when the claimant was employed by the respondent as a senior business development manager. The claimant was diagnosed with asthma as a child from about the age of 13. The claimant says, 'My anxiety condition developed and has continued following my separation and divorce in 2009/2010. It is well-established that divorce is the second stressful life event.'
- (13) The claimant's impact statement is unhelpful to the extent that it does not distinguish between the impact on the claimant's ability to undertake his day-to-day activities that the claimant may have experienced during the material time and what has arisen post the termination of employment. It is the claimant's evidence that over time his symptoms have intensified and the subsequent adverse effect on his ability to carry out his normal day-to-day activities have increased. The claimant places particular emphasis upon the anxiety he experienced related to the Covid19 pandemic. Within his impact statement the claimant states that, 'Covid19 had a severe effect on my mental health it has increased my anxiety to the next level and concerns for catching a respiratory virus which might kill me. Whilst I have experienced anxiety for a long time, Covid19 for me added a new dimension which has been bordering paranoia, increasing the frequency of my anxiety and depression, with consequential increase in asthma attacks...'. During cross-examination the claimant said that everything changed with Covid19 both psychologically and physically.
- (14) The impact statement discusses anxiety in general terms and sets out symptoms that the claimant says he regularly experiences. The claimant sets out the significant impact of his anxiety with reference to Covid19. While the claimant provides further information about the impact on his day-to-day activities including an inability to visit new or unknown places, panic attacks that include asthma symptoms and shortness of breath, an avoidance of meeting people and social isolation due to anxiety levels, difficulty travelling on public transport inducing anxiety and panic attacks, no specific examples are provided to allow the tribunal to concentrate on the material time.
- (15) During the course of giving further oral evidence in chief and cross-examination the claimant said:
 - (i) he had interacted and engaged with his GP over the years.
 - (ii) he had a panic attack on a train in November 2019 and was told by Mr Derek Bell following the incident not to worry.
 - (iii) he took the train rather than driving to Ipswich (the respondents offices) due to his anxiety and that his anxiety in respect of Covid19 started around the end of December 2019. He said he was in a very bad state relating to anxieties surrounding Covid19.

- (iv) commented on the various stressful life events that had triggered visits to his GP where anxiety is mentioned prior to Covid19.
 - (v) his symptoms were far more consistent over the Covid19 period and that Covid19 was a 'game changer' in respect of his anxiety.
 - (vi) he needed support to use the trains and in particular to the support of a colleague Mr Matt Lawson. The claimant said this occurred around February 2020.
 - (vii) accepted that during his employment he attended work social events, organised and attended in person business development initiatives in Leeds and Shoreditch and a Christmas party in Ipswich at swingers golf club.
 - (viii) accepted that during the course of his employment, when he attended the respondent's offices that he took cigarette social breaks with his colleagues and smoked with his colleagues. The claimant said he was not a smoker but did so on those occasions looking for escape. On these occasions the claimant accepted that he would stand in the smoking shelter in close proximity to others who were smoking.
 - (ix) he is unable to disconnect his anxiety from his asthma. And describes dealing with the Covid19 pandemic as the hardest period of his life.
 - (x) he became concerned about Covid19 due to the reports emerging from China/ South America and recalled media reports in late 2019.
 - (xi) there was considerable uncertainty at the time and no one knew how long the Covid19 wave would last. He said matters began to look bleak from January 2020 as a high percentage of people who died had respiratory conditions. He noted the problems that were experienced and reported on from Italy.
 - (xii) he denies that his anxiety is triggered by events, and refers to the letter from Dr Watt relating to PTSD and reference to, 'what if'. The claimant acknowledged that PTSD diagnosis was from 2022.
- (16) The claimant's medical records contain the following relevant information
- (i) There is intermittent reference to anxiety within the claimant's GP records prior to the material time. They appear related to various stressful life events as commented upon by the claimant during the course of cross-examination. For example the entry from 28 August 2019 notes, 'Some anxiety due to life events...'. The notes in May 2019 referred to the claimant experiencing anti-Semitic racist treatment. and being a victim of a hate crime and ongoing custody issues. There is a reference to a dispute with the previous employer.
 - (ii) There is an entry in September 2019 noting stress at work and that the claimant, while working for a previous employer was 'insulted at work racially' and had taken out a grievance was due to be heard in a three weeks and the claimant had ongoing issues relating to his ex-wife.
 - (iii) The next relevant entry relating to anxiety is from 14 February 2020, '.... Ongoing panic attacks flared up recently, had few episodes in last few weeks. Feel stressed and tension in back of neck associated with panic.'

- (iv) On 19 February 2020, the claimant's problem is stated to be, 'anxiety state'. The notes refer to ongoing family issues and stress at work. It states, 'Patient tells me that over the last two weeks he has increasing anxiety, culminating in panic attacks and irrational's usually starting with tense feeling and left side of neck and arm.....'
 - (v) On 20 March 2020 the GP records note, anxiety is well controlled so not wanting to take any medications..'
 - (vi) Thereafter The GP records reflect the claimant's concerns in relation to the risks of Covid19 alongside his asthma.
 - (vii) In July 2020, the GP notes, 'feels depression and anxiety are worsening. In large part due to Covid19, finds it very hard to leave the house. Describe some panic attacks both in the house and outside...'
 - (viii) The claimant has historically had regular reviews with the asthma nurse attached to his GP practice. However, it can be seen from his medical notes that during the material period the claimant's asthma review was due on 1 November 2019, the claimant was chased by the GP practice and the review appears not to have been completed until June 2020.
- (17) Medication:
- (i) the claimant said that he was not taking any medication or treatment for his anxiety during the material time.
 - (ii) He has an inhaler, described as a salbutamol relieving inhaler and a Fostair Preventer inhaler. It can be seen from his GP notes that he had inhalers during the material time. There are references within the notes to the claimant having large quantities and also losing his inhalers. I explained to the claimant that I was required to assess the effect on day-to-day activities of his impairments, in the absence of measures such as medication for treatment. The claimant did not address this in his impact statement. In response the claimant told me that if he did not have inhalers he would panic and hyperventilate. If he was out of his home without ventilators he would seek an emergency supply and he would need to know that he did have access to these inhalers. I noted to the claimant that his response appeared to indicate that an absence of his inhaler would cause anxiety issues, but not necessarily increased symptoms related to asthma. The claimant said that if he was without his inhalers he would be in casualty very quickly due to his asthma. The claimant was unable to make any distinction in respect of any particular time. There was no medical evidence to assist me further in assessing the likely effect of the claimant's asthma without his medication during any particular period of time or at all.
- (18) I note the letter from Dr Oldfield of North Street Medical Care dated 8 March 2021. This letter confirms that the claimant is, 'currently having regular review and treatment for anxiety. He is currently engaging with CBT therapy and medication, which has recently been increased'..... He reports significant anxiety in group situations and leaving the house. Reports that his anxiety has also significantly affected concentration. The letter notes that Mr Franklin symptoms of asthma exacerbate his anxiety.

- (19) I note the letter from Dr Watts from Priory North London dated 30 September 2022 that states inter-alia:
- (i) he is a 50-year-old man who has had an anxiety disorder(panic disorder(F41), complex PTSD (F43) which started three years ago.
 - (ii) ‘.. Four years ago he had a severe panic attack was stuck for hours on dark the breach. These days he gets anticipatory anxiety in a variety of settings e.g. having to travel on planes and trains. He experiences body aches and his head begins spinning. It is accompanied by thoughts such as, ‘what if I have another panic attack’.
 - (iii) ‘.. In his medical history he has had asthma since the age of 11.... He takes inhalers’
- (20) There is no explanation as to why Dr Watt’s refers to asthma, ‘which started three years ago’. That would indicate that according to Dr Watts the claimant’s anxiety commenced in approximately November 2019. While the claimant believed it was the case, there was no evidence before the tribunal to indicate that Dr Watts had sight of the claimant’s previous medical records.

Deliberation and decision

- (21) My starting point is the definition of disability within the Equality Act 2010. The claimant has shown that he has a ‘physical impairment’ by way of asthma. Further the claimant has shown that he has on various occasions and to various degrees suffered from anxiety.
- (22) The GP records are helpful and the claimant confirmed that he cooperated with his GP. These records are likely to be the most reliable way of identifying the various symptoms experienced by the claimant at specific times.
- (23) I do not consider that the letters from either the GP or Dr Watts assist the claimant. The GPs letter is confined to the circumstances that exist in March 2021. Dr Watts suggests that the claimant’s anxiety has lasted for three years as of 30 September 2022, but there is no explanation or corresponding entry within the GP notes from September 2019 that would explain any reason for suspecting that the claimant’s anxiety as diagnosed commenced in September 2019. It is possible that Dr Watts refers in general terms to the start of the Covid19 pandemic, but I am not told. The various adverse effects set out by the claimant within his impact statement can be identified within the claimant’s GP notes but appearing to commence with the emergence of Covid19. I also note the reference within Dr Watts letter to anxiety based on ‘what if’, I note the reliance placed by the claimant upon this. However while that may be an issue in September 2022, the available medical evidence from the material time relates to anxiety in response to life events rather than a more generalised, ‘what if’ scenario.
- (24) Mr Johnson has argued that the claimant’s anxiety should be treated as a recurrent condition with reference to his episodes of anxiety prior to the material time. I refer to paragraph 2(2) of schedule 1 to the Equality Act 2010 and note that in the circumstances:
- (i) the claimant has not identified any particular time or previous occurrence of anxiety that had an impact on his ability to carry out his day-to-day activities. I am assuming that the claimant refers to the occasions where anxiety is noted within his GP records and back

to the time of his separation/divorce in 2009/2010. I accept on the balance of probability that the claimant was likely to have experienced anxiety at those times as recorded by his GP as he has claimed.

- (ii) The claimant has produced no evidence of any adverse effect on his ability to carry out his normal day-to-day activities (whether said to be due to anxiety and/or asthma) during any period of time prior to the material time.
 - (iii) The claimant has produced no evidence to suggest that at the time of any earlier episodes of anxiety, that any continuing effect on his day-to-day activities was, at that time, likely to recur.
 - (iv) All evidence available to the tribunal suggests that the periods of anxiety experienced by the claimant prior to the material time were in direct response to stressful life events rather than a suspicion of ongoing mental illness producing symptoms of anxiety.
- (25) Taking into account the entirety of the evidence I conclude that the claimant has not on the balance of probability shown that his anxiety was at the material time a 'recurrent' impairment as envisaged under paragraph 2(2) of schedule 1 to the Equality Act 2010.
- (26) The difficulty I have encountered in this particular set of circumstances is that the claimant's evidence has not been tailored to address 'material time'. Further the claimant's evidence is that emergence of Covid19 has triggered a substantial deterioration in his anxiety and ability to carry out his day-to-day activities. The claimant says that this started to happen in late 2019 when he was aware of news reports emerging from China and other parts of the world. The material time commences just before this time in November 2019. For this reason I have made findings in relation to the claimant's status prior to and post the emergence of Covid19.
- (27) Pre Covid19 material time: While I am unable to precisely date this time, it is a relatively short period as the claimant's evidence is that his Covid19 related anxiety began with news from China and other parts of the world likely to be in late 2019. Pre-Covid19, the claimant has shown that he has experienced periods of anxiety in response to various life events. This is expressly referenced in the GP entry of August 2019. The claimant has not shown that the adverse effects on his ability is to carry out his day-to-day activities that he has referred to within his impact statement, were present or existed in the pre-Covid19 time. Serious adverse effects on the claimant's ability to carry out his day-to-day activities are noted in the claimant's GP records in the post Covid19 period, these correspond to some extent to the effects recorded within the claimant impact statement. They are not identifiable at this pre-Covid material time within the GP notes. Taking the entirety of the evidence into account, I conclude that the substantial adverse effects experienced by the claimant as set out within his impact statement are more likely than not to have commenced with Covid19. I conclude that the claimant has not shown on the balance of probability that, at the material time pre Covid19, that the combined effect of his anxiety and depression had a substantial effect on his ability to carry out his normal day-to-day activities.
- (28) The claimant told me that he was not taking medication or treatment for his anxiety during the material time. The claimant did have a prescription for

inhalers are set out above. I have considered whether the claimant's asthma, taking into account the claimant's ongoing use of inhalers, would bring the claimant within the definition of disability pre Covid19. The claimant's evidence is that his asthma is very much tied to his anxiety. The claimant has produced no medical evidence to assist me to assess the potential effect of the claimant's asthma (combined with his anxiety) in the absence of his asthma medication. However, I do note that during this time the claimant was smoking and choosing during days he attended the office to socialise with those who were smoking. The claimant had allowed his regular asthma check-up to slip and was being chased by the GP surgery. These matters could suggest that the claimant had no or limited issues, during this time pre Covid19. The Claimant has not provided sufficient evidence to allow me to conclude that in the absence of his medication, in pre Covid19 time, that the claimant's asthma and/or anxiety viewed together and in the absence of medication would result in a substantial adverse effect on his ability to carry out day-to-day activities.

- (29) Post Covid19 material time: Again, it is not possible to precisely date of this period, but it is likely to commence in late 2019 to the end of the material time on 23 April 2020. I consider that the claimant has shown that the position is significantly different following the emergence of Covid19. As the claimant became concerned about Covid19, the combined effect of his anxiety and asthma is likely to have had a substantial effect on the claimant's ability to carry out his day-to-day activities. I consider it more likely than not that it was at this point that the claimant started to experience the symptoms referred to within his impact statement. This is the 'game changer' referred to by the claimant within his evidence. The existence of Covid19 was the driver of the impact the claimant's impairments had on his ability to carry out his day-to-day activities. At this point, I consider it more likely than not that the claimant's asthma increased with his anxiety which in turn also makes it more likely that the claimant relies upon his inhalers. While I do not need to go on to examine the likely situation in the absence of medication, it is likely that the effects of the claimant's asthma when combined with this substantially increased anxiety would be more severe in the absence of his inhalers.
- (30) I must consider whether the impairment at that point had lasted or was likely to last for 12 months. We now know that the Covid19 wave was a pandemic that lasted considerably longer than 12 months. We know that the claimant has shown that its effects continued to drive his anxiety and asthma resulting in a substantial effect on his ability to carry out his day-to-day activities over a long period of time. However, I must judge the situation as it existed at the time and on the basis of the information that was available at the material time. I consider that when looking at the material time, as the claimant conceded during his evidence, there was considerable uncertainty as to how Covid19 would play out. I do not consider it is possible to conclude that at any time from late 2019 to April 2020, that Covid19 had lasted 12 months or was likely to last for at least 12 months. There was debate at that time as to how long the Covid19 wave was likely to last. Had the Covid19 virus developed differently and receded, it would have been reasonable to expect the impact of the claimant's combined asthma and anxiety to have similarly receded. Taking the entirety of the evidence into

account I conclude that the claimant has not shown that the substantial adverse effects that he suffered due to the combined effect of asthma and anxiety had lasted or were likely to last in excess of 12 months at any point during the material time.

- (31) In light of the above I concluded that the claimant did not at the material time have a disability as defined by the Equality Act 2010.
- (32) It is common ground between the parties and recorded within the previous case management discussion that the only claims remaining within this litigation relates to disability discrimination. In light of my findings in respect of disability, I conclude that the claimant's claims for disability -related discrimination are unsuccessful and dismissed.

Employment Judge Skehan

24 November 2022

Sent to the parties on:

7 December 2022

For the Tribunal: