



# EMPLOYMENT TRIBUNALS

## Claimant

## Respondents

Mr Andrew Pearce

v

Buck Consultants Limited

**Heard at:** Norwich

**On:** 7 December 2022

**Before:** Employment Judge S Moore

## Appearances

**For the Claimant:** In person

**For the Respondent:** Mr J Bryan, Counsel

## JUDGMENT ON PRELIMINARY ISSUES

- (1) The Claimant was not a disabled person within the meaning of section 6 of the Equality Act 2010 at the material time and the claim of disability discrimination is struck out.

## REASONS

### Introduction

1. The purpose of this Preliminary Hearing was to (i) finalise a List of Issues, (ii) determine whether the Claimant was, at the material time, a disabled person for the purpose of the Equality Act 2010 (EqA) and (iii) make case management orders. Items (i) and (iii) are dealt with in a separate Case Management Summary.
2. At the outset of the hearing the Claimant stated that the material time for the purpose of his disability discrimination claim was from 2nd to 31st March 2021 and that the impairments upon which he relied for the purpose of that claim were (i) depression and anxiety, and (ii) epilepsy.

## Evidence

### *Depression and Anxiety*

3. On 16 July 2020 the Claimant presented to his GP complaining of stress since 10 July 2020, having been off work since 15 July 2020. On the surgery portal he described the problem as being an “incident at work”, stating he felt he had “been placed under pressure for expressing concern” and that the “pressure he had been put under was stressful”. He stated that he wanted “a certificate until the end of next week to give me a break from pressure/stress + time to find out what is happening and if absolutely necessary seek legal advice”. He was signed off as not fit for work from 16 July 2020 to 27 July 2020 on grounds of “work related stress” and prescribed 25 mg tablets of Amitriptyline.
4. The Claimant subsequently returned to work.
5. On 20 October 2020 the Claimant presented to his doctor again. On the surgery portal the Claimant stated “things improved for a while after I went back but have recently worsened again and I’m struggling to cope with this on top of carer responsibilities out of work. I am worried and not sleeping and I’m feeling pretty low.” The Claimant was issued with a further not fit for work note from 21 October 2020 to 3 November 2020 on grounds of “work related stress”.
6. On 2 November 2020 the Claimant was reviewed. The Claimant stated he was still not sleeping well and was very worried about going back to work, and that he wanted to get a counselling referral. The Claimant was issued with a further not fit for work note from 3 November 2020 to 16 November 2020 on grounds of “work related stress”.
7. On 16 November 2020 the Claimant presented to his doctor again, stating on the portal that he couldn’t go back to work at the moment because he felt anxious and worried just thinking about it and that his sleep was still very erratic. On 17 November 2020 he was seen by a GP. In the note the GP records the problem as “mixed anxiety and depressive disorder”, that the Claimant had had a long talk with him about concerns with work and that he (the GP) advised him to consider going back to work “to see how things are or involving external agencies” but that the Claimant “was not keen on this”. The Claimant was issued with a further not fit for work note from 17 November 2020 to 14 December 2020, again on grounds of “work related stress”, and he was prescribed 50mg daily of Sertraline.
8. On 11 December 2020 a further not fit for work note was issued from 11 December 2020 to 10 January 2020 on grounds of “work related stress”.
9. By January 2021 the Claimant was proposing a phased return to work. To this purpose a meeting between the Claimant and the Respondent took place on 7 January 2021. While I make no detailed findings about what

was said at that meeting it is common ground the Respondent raised the possibility of the Claimant facing disciplinary proceedings for having taken on significant commitments to Lowestoft Town Council without, the Respondent says, informing the Respondent and asked the Claimant to consider whether he wanted to have a “protected conversation”. The Claimant’s evidence is that the Respondent did not want him to return to work, that he was “floored” by the Respondent’s hostility and that this fueled his anxiety and depression.

10. On 8 January 2021 the Claimant presented to his doctor again. On the online portal at 08.15 he gave a relatively lengthy description of the meeting on 7 January 2021, then stated “Please extend my certificate for a further month so I can contact a solicitor for legal advice and decide how to respond to this latest situation. I don’t want to be railroaded out of my job, but if I go back on Monday, I will be subject to disciplinary proceedings on a spurious pretext which will effectively be victimization of a whistleblower. If I stay away from work without a medical certificate, I’ll be AWOL and subject to dismissal anyway. I need an extension to my certificate so I can seek advice from a solicitor.”
11. At 13.07 the Claimant accessed the online portal again, reiterating what had happened and that he needed an extension of his certificate “so that I have some breathing space to obtain legal advice”. He further stated “I can’t go back to work on Monday feeling like this and face trumped up disciplinary proceedings on top of everything else from the same individuals who put me in this position and caused my stress to start with. I wouldn’t stand a chance.”
12. The Claimant was subsequently issued with a further not fit for work note from 10 January 2021 to 9 February 2021 on grounds of “work related stress”.
13. On 5 February 2021 the Claimant presented to his doctor again. On the online portal he wrote: “I have been off work with work related stress since October 2020, although the stress started in July 2020. My employer is now trying to pressure me to sign a settlement to leave. The way they are treating me is just a racheting up of previous victimization and intimidation. I’m currently taking advice from a solicitor. Dr Lockyer is aware of the situation – in early January he extended my certificate to 9 Feb 2021 and said it could be extended further if needed. I need to speak with Dr Lockyer before my current certificate runs out next Tuesday...My sleep is still very poor so I would also like to request a prescription for something to help me sleep.”
14. The Claimant was subsequently issued with a further not fit for work note from 5 February 2021 to 4 March 2021 on grounds of “work related stress”.
15. On 8 March 2021 the Claimant presented to his doctor again stating on the portal he had been signed off with work-related stress since 21 October 2020 and that his last certificate expired on 4 March 2021. He then stated

“I have recently submitted a formal complaint/grievance regarding what is happening to me and I think this will probably end up at an employment tribunal. Please can I have a telephone consultation with Dr Lockyer so I can request a month’s extension to my certificate (from 04.03.21) and also a prescription for medication to help me sleep....I need to speak with my doctor urgently because I don’t want my employer to be able to use the absence of a certificate to allege that I’m AWOL.”

16. The Claimant was subsequently issued with a further not fit for work note from 4 March 2021 to 3 April 2021 on grounds of “work related stress”.
17. On 5 March 2021 the Claimant emailed the Respondent stating “My doctor has confirmed he will sign me off, as clearly I would face a hostile and intimidating atmosphere (including express threat of disciplinary proceedings) if I attempted to return to work...”
18. On 26 March 2021 the Claimant was informed by Becky Smallwoods of Human Resources that the Respondent would not be bringing disciplinary proceedings against him relating to activities up to the date of that email.
19. On 28 March 2021 the Claimant sent Edward Smithson of the Respondent a lengthy email stating, amongst other things, that “The only reason I have remained off since January is the bullying, intimidation and victimization by those individuals, in making it clear to an employee who had already been off ill with work-related stress for two and half months that he would face an unwelcoming and hostile reception if returned to work. While the threat of unspecified disciplinary proceedings may finally have been lifted, this has now been replaced by Becky’s harassment in E-mailing me directly against my express wishes and attempting to interfere in and prejudice the handling and outcome of my grievance.”
20. In a further lengthy email to Edward Smithson of the same date, the Claimant stated, “As I have pointed out previously, I am off with work-related stress. My illness does not prevent me from leading my life outside work, and indeed I just try to keep myself busy and occupied rather than brood and become depressed which would only make things worse.”
21. The Claimant did not present to his doctor again until 7 April 2021 (after the material period for the purposes of his discrimination claim). He remains employed by the Respondent but has not yet returned to work.
22. In his impact statement the Claimant said his anxiety and insomnia had aggravated each other, with the principal impact being on his energy levels. Cognitively he had generally been fine, but it could take him a long time to get started in the morning after a poor night, and he often found himself putting off things at home and elsewhere so that they built up which led to him being chased and creating further anxiety. Further, because the underlying stress that lay at the root of everything was work-related there were additional effects on his work. In particular, he was slowed by double and triple checking everything. The statement further provides “it was only work for [the Respondent] that was affected in this

way, because work (and in particular my manager's treatment of me) were the root cause of my stress and anxiety; other activities outside of work weren't impacted in the same way because outside of work I felt that I was in a safer environment with more control over what I was doing and what was happening to me..."

23. In this respect the Claimant agreed in cross-examination that throughout his absence from work he had carried on his role as a town councilor. He had also become a volunteer at a local school. However, he said those commitments were rarely in the morning and didn't test his stamina in the same way as a working day because they only lasted a few hours. He further said that while his not fit for work notes gave a diagnosis of work related stress, towards the end of October 2020 the stress spilled over into depression and anxiety. Although he had felt well enough to want a phased return to work in January 2021, the meeting on 7 January 2021 had "floored him" and his anxiety had "gone through the roof". Although his requests on the GP portal had been expressed in terms of needing time off work to get legal advice, he had needed a respite from work for medical reasons. He had encountered hostility and couldn't handle the confrontation, but he also needed to deal with practical matters. He further said that his illness had affected his ability to deal with domestic chores like cooking and cleaning, and he had stopped reading for pleasure, but agreed he hadn't put those things in his impact statement. Although he had continued to write lengthy emails to the Respondent during March, and had submitted a grievance on 2 March 2021, this was because his cognitive abilities were not impaired by his illness. However, the effort of that correspondence had drained him.

### *Epilepsy*

24. As regards the Claimant's epilepsy, the evidence was that the Claimant had suffered from epilepsy for forty years. In 2019 he had had an epileptic seizure for the first time in twelve years.
25. An email from the Claimant of 10 December 2019 to Martin Armstrong of the Respondent states: "I'm sorry I didn't phone in yesterday. This viral illness I've had triggered an epileptic seizure on Sunday, the first one I've had in 12 years, so I got taken into hospital for a day and I only came home again last night. All being well I will be back at work tomorrow."
26. In response to an email of the same date from Martin Armstrong asking what to do in the event the Claimant should have a seizure, the Claimant replied: "I may well swap a WFH day tomorrow, if that's OK. I ache all over at the moment! It's difficult for me to advise anyone one what to do if I have a seizure - I'd gone 12 years until this latest one without having one and when I did have them I'd have no awareness or memory of what was happening. But if there is someone around who has first aid training and knows how to put someone in the recovery position that would be good – about the best until the seizure is over."

27. Prior to that gap of twelve years the Claimant said he had, had seizures every three to four years. He had not taken any medication for epilepsy for about twenty years because he said it had no effect on the frequency of his seizures.
28. As regards the effect of epilepsy on his ability to carry out normal day to day activities, the Claimant said in his impact statement that it had no direct impact though he worried the medication he had been prescribed in the context of his stress and insomnia might have an aggravating effect and trigger a seizure and that the prolonged stress and insomnia itself might do the same. In cross-examination the Claimant effectively repeated this position, accepting that his epilepsy had no other impact on his day-to-day activities.

### Submissions

29. For the Respondent Mr Bryan submitted there was insufficient evidence that the Claimant had a mental impairment of depression and anxiety, as opposed to suffering from stress. Further as at March 2021, it appeared the main reason the Claimant had sought to be signed off was because he wanted to take legal advice. There were strikingly few references to any adverse impact of the alleged depression and anxiety on the Claimant's ability to carry out day to day activities and he had been able at all times to continue working in his role as a town councillor.
30. In conclusion Mr Bryan submitted this was a classic case of "medicalization" of problems at work (**J v DLA Piper UK LLP [2010] IRLR 1052**) or an "entrenched" reaction to "circumstances perceived as adverse" (**Herry v Dudley Metropolitan Borough Council [2017] ICR 610**). In that latter case the EAT at [56] described a situation:

"...where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An employment tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an employment tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an employment tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the employment tribunal to assess."
31. As regards epilepsy, the Claimant had appeared to accept this didn't have a substantial adverse effect on his ability to carry out day to day activities.

He further pointed out that on 31 March 2021, Ms Davidson, a friend of the Claimant, had written on his behalf to the Respondent stating “epilepsy is not the health matter at the forefront now”.

32. Mr Pearce submitted that although his fit notes referred to work-related stress, there was evidence of depression and low mood too. His work-related stress had caused the disability of depression and anxiety. Although he had been up front that he could still function at a high level, he had difficulties with stamina and getting up in the morning. He hadn't had an entrenched position about not returning to work, but in March although the Respondent had removed the threat of disciplinary proceedings, they had replaced that threat with another hostile act through the continued contact from Becky Smallwoods. The meeting on 7 January 2021 had made him feel physically sick and he panicked. He hadn't sought a fit note to get legal advice but because the meeting had made him ill. As at March 2021 there were clearly reasonable grounds for believing his depression and anxiety would last 12 months, and so it has transpired.
33. As regards his epilepsy, Mr Pearce said that while it didn't have an impact on his day-to-day activities, he was concerned about the effects of his depression on epilepsy and in fact he had, had a further seizure a couple of weeks prior to the hearing.

## Conclusions

### *Disability*

34. Section 6 of the Equality Act (“EqA”) says that:
- (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.”
35. **Goodwin v Patent Office [1999] ICR 302** provides there are four limbs to the definition in s. 6(1):
1. Does the person have a physical or mental impairment?
  2. Does that impairment have an adverse effect on their ability to carry out normal day to day activities?
  3. Is that effect substantial?
  4. Is that effect longterm?
36. However, Underhill J stated in **DLA Piper** at [40]: that

“...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-day activities is adversely affected (on a long-term basis) and to consider the question of impairment in the light of those findings.”

37. As to the meaning of substantial, section 212(1) EqA and paragraph B1 of the Guidance on matters to be taken into account in determining questions relating to the definition of disability 2011 (“the Guidance”) state that a substantial effect is one that is more than a minor or trivial effect and reflects the general understanding of a disability as a limitation going beyond the normal differences in ability which may exist among people.
38. As to the meaning of long-term, paragraph 2 of schedule 1 EqA says:
- “(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 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 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.”
39. Further the Guidance states at paragraph C4 that likelihood must be judged on the circumstances at the relevant time and anything which occurs after that time is not relevant in assessing likelihood; (see also **All Answers Ltd v W [2021] EWCA Civ 606 at [26]**).
40. For the purposes of section 6(1)(a) the Claimant relies on the mental impairment of depression and anxiety and the physical impairment of epilepsy.

#### *Depression and Anxiety*

41. As regards the alleged mental impairment of depression and anxiety, there is a plainly a dispute between the parties as to whether as at March 2021 the Claimant suffered from an impairment at all. The Respondent’s position is that the Claimant was not at this time suffering from a mental illness or impairment, but rather experiencing a stress reaction to perceived unfairness and hostility at work.
42. In these circumstances I find it appropriate to consider the evidence of any adverse effect on the Claimant’s ability to carry out normal day to day activities.
43. Here, while the focus should be on what the Claimant can’t do, or can only do with difficulty, rather than on what he can do (Guidance at paragraph B9), there is very little evidence as to what the Claimant couldn’t do. There is evidence the Claimant had difficulty sleeping and that this in turn affected his ability to “get going” in the morning and his general stamina and also the tendency to put things off. Further in oral evidence the



Claimant referred to reluctance to carry out a big shop, a tendency to pick at food and refrain from domestic chores and that he had stopped reading for pleasure. Overall, I find this evidence to be vague to fall short of establishing a substantial adverse effect on the ability to carry out normal day to day activities. That conclusion is bolstered by the evidence of what the Claimant continued to do while he was absent from work, particularly in March 2021, and the evidence that his life outside of work does not appear to have been substantially affected (as the Claimant himself stated in his impact statement). He was at all times able to continue working as town councilor, he took up a volunteering role within a school, and he was plainly able to write lengthy and articulate emails and to seek out legal advice.

44. Other evidence also points to the Claimant's state of mind as being that of a stress reaction to events at work rather than a mental impairment of depression. In all the GP records the only reference to depression is on 17 November 2020 where the notes record "mixed anxiety and depressive disorder". By contrast all of the doctors not fit for work notes sign the Claimant off work on grounds of "work related stress". Further the Claimant's own communications with the Respondent refer to stress rather than depression and it is notable that his contacts with his GP appear driven by the need to obtain a new not fit for work note, rather than the need for medical intervention. This is particularly true of the Claimant's approaches to his GP in January, February, and March 2021 where his own wording on the portal is very specific about the need to obtain a not fit for work note to enable him to seek legal advice, to avoid facing a hostile situation at work and disciplinary proceedings, and to ensure the Respondent has no grounds for accusing him of being absence without leave. Similarly, when the Claimant emailed the Respondent on 5 March 2021 his expressed reason for being signed off was that he "would face a hostile and intimidating atmosphere (including express threat of disciplinary proceedings) if I attempted to return to work..." rather than stating he was too unwell to return. On 28 March 2021, an email to the Respondent stated: "My illness does not prevent me from leading my life outside work, and indeed I just try to keep myself busy and occupied *rather than brood and become depressed which would only make things worse*" (my italics).
45. Overall, I agree with Mr Bryan's submission that the Claimant's case bears a striking similarity to that in **Herry v Dudley Metropolitan Council** where the Employment Judge held at [22] "The material before me suggests [the claimant's] stress is very largely a result of his unhappiness about what he perceives to have been unfair treatment of him, and to that extent is clearly a reaction to life events" (as quoted on appeal at [61]).
46. I note that as at March 2021 the Claimant had been prescribed 25 mg tablets of Amitriptyline and 50mg daily Sertraline and paragraph 5 of schedule 1 to the Equality Act 2010 requires that "an impairment" is 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 correct it and (b) but for that it would be likely to have that effect.

47. However, since I am not satisfied the Claimant was suffering from a mental impairment paragraph 5, on the face of it, does not arise. Secondly and in any event, since there is no medical evidence before me as regards the likely effect on the Claimant's ability to carry out normal day to day activities in the absence of medication, I am not satisfied that as at March 2021 there would have been a substantial adverse effect on his ability to carry out normal day to day activities in such circumstances.
48. In the light of the above I am not satisfied that as at March 2021 the Claimant had a mental impairment of depression and anxiety which had a substantial effect on his ability to carry out normal day to day activities and therefore the issue of whether any such substantial adverse effect was long term does not arise. However, the fact it's plain his prognosis was intrinsically connected to the satisfactory resolution (from the Claimant's perspective) of his problems at work links with and endorses my conclusions in respect of the other limbs of the **Goodwin** test.
49. For these reasons I find the Claimant has not discharged the burden of showing that as at March 2021 he was a disabled person by reason of depression and anxiety.

### *Epilepsy*

50. While it is common ground the Claimant has the physical impairment of epilepsy, Mr Bryan submitted there was no evidence this impairment had a substantial adverse effect on the Claimant's ability to carry out day to day activities (particularly in March 2021) and the Claimant largely agreed this was the case without expressly conceding the point.
51. The evidence is that as at March 2020 the Claimant had had a seizure in December 2019, triggered, he thought by a viral illness. This had been the Claimant's first seizure in 12 years, although previously he had tended to have one every three to four years. From the exchange of emails in 2019 it appears that such a seizure causes the Claimant to lose consciousness for short while and that, at least in 2019, he experienced aching for a day or two afterwards. There is no evidence that at other times the Claimant's epilepsy has any effect on his ability to carry out normal day to day activities and accordingly I am not satisfied his epilepsy has a substantial effect on his ability to carry out normal day to day activities.
52. It therefore follows I am not satisfied the Claimant was a disabled person as at March 2021 by reason of epilepsy.

### **Conclusion**

53. Since I have found that as at March 2021 the Claimant was not a disabled person within the meaning of the Equality Act 2010 it follows that his claim for disability discrimination must be struck out.

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Employment Judge S Moore

Date: 14 December 2022

Sent to the parties on:

15 December 2022

For the Tribunal: