



EMPLOYMENT TRIBUNALS

Claimant: Ms L O'Donnell
First Respondent: The Cambridge City Foodbank
Second Respondent: Mr S Thornton
Third Respondent: Ms M Edney
Fourth Respondent: Mr J Edney

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Watford Employment Tribunal (by CVP)
On: 6 December 2022
Before: Employment Judge Kelly (sitting alone)

Appearances

For the claimant: In person
For the respondent: Ms Bradbury, barrister

JUDGMENT

1. This was a hearing to determine whether or not the claimant had a disability under the Equality Act 2010 ('EQA') at the relevant time. The relevant time was identified as being 20 December 2021 to 7 February 2022.
2. The medical condition relied on by the claimant as being a disability was 'mixed anxiety and depression'. The respondent accepted that the claimant had this condition but did not accept that it was long term or that it had a substantial effect on the claimant's ability to carry out day to day activities.
3. We were referred to a bundle of documents. The claimant gave evidence and was cross examined. We heard submissions from both parties. The respondent provided a written submission.

4. The claimant had produced a copy of her electronic GP record from Nov 2005 to Sep 2022 which she had heavily redacted. The Tribunal's order of 14 August 2022 had stated that the claimant could blank out anything that was clearly not relevant. In an email to the respondent of 30 Sep 2022, the claimant explained the redactions as being related to other medical issues or personal information not relevant to the case, such as her dog's name or where her sister lived.
5. The GP record showed that the claimant consulted her GP in relation to anxiety with depression:
 - a. in 2005, in November and twice in December;
 - b. in 2006, in February, March, May, September, November;
 - c. in 2007, in March, May, October, November;
 - d. in 2008, in March, May, September, November;
 - e. in 2009, in May, July, August, October;
 - f. in 2010, in January, February, May, June, July, September;
 - g. in 2011, in June, July (when the claimant was referred for CBT), in August (when the claimant was accepted onto a psychological health pathway, in September, December;
 - h. in 2012, in June, August, September, December;
 - i. in 2013, in January (when the claimant was not doing so well and would like to be referred for CBT), February twice, March, April (when it was recorded that the claimant stopped citalopram in November 2012 and relapsed), June, August;
 - j. in 2014, in November;
 - k. no entries in 2015;
 - l. in 2016 in September;
 - m. in 2017, in July, October (when there was a plan to cut down on sertraline gradually);
 - n. in 2018, in December (when the claimant had restarted sertraline and felt better), again in December (when it was noted that depression had worsened over past few weeks and the claimant was feeling very low);
 - o. in 2019, in February (when she was to continue sertraline), May (when it was recorded that the claimant has to rest), again in May, June;
 - p. no entries for 2020;
 - q. in 2021, in February (when the claimant was spending hours in bed and felt catatonic and very low and was referred for counselling). The entry here is under the heading, 'Problem: Stress at home';

- r. in 2022, in January (when the claimant was eating and drinking and had suicidal thoughts and had a panic attack); again in January, again in January (when she was in a bad place and struggling to keep her mood even and was prescribed diazepam as well as sertraline), again in January (when she had found new strength).
 - s. Other entries are after the relevant period.
6. The respondent submitted that all of the entries in the GP record where the detail was redacted did not relate to the medical condition relied on by the claimant. We consider this a misreading of the claimant's email of 30 Sep 2022 in which the claimant explained the redactions as being related to other medical issues **or** personal information not relevant to the case (our emphasis). The claimant stated in the Tribunal that the redactions were of personal information about what was going on in her life at the time such as moving house or a relationship breakdown.
 7. The claimant was not cross examined on the respondent's submission that all of the entries in the GP record where the detail was redacted did not relate to the medical condition relied on by the claimant, and so we do not consider the respondent is in a position to rely on this submission. In any event, the entries which are redacted are all headed 'Problem: Mixed anxiety and depressive disorder (X00Sb) – Anxiety with depression' (except for one headed 'Problem: Stress at home' in February 2021). Therefore, we consider it evident that the medical problem discussed was the anxiety and depression.
 8. The claimant confirmed that the content of her claim form of 8 Jun 2022 was true and accurate to the best of her knowledge and belief. She recorded here relevant to the issue as follows: She had experienced anxiety and depression for most of her life and had been on medication since 2005. She could easily slip into a catatonic-like state where simple tasks became near impossible. She was not able to work full-time and managed her condition by working part-time, resting often. She had a breakdown in 2013. She took naps in the office when working there alone. She needed more time to process verbal communication, she became easily confused if things were not set out clearly. She was less able to deal with usual work stresses. She was prone to needing time off work due to her disability. She did not give any timescale for these issues.
 9. The claimant had produced a disability impact statement of 12 Sep 2022 which she confirmed was true and accurate to the best of her knowledge and belief. This set out relevant to the issue the following information: She had taken antidepressants since 2005 except when she stopped twice for a number of months and then became very unwell. (The claimant was not challenged on this.) Her anxiety increased in November 2022. She had to take regular naps. She then described her state after a work meeting she found stressful on 20 Dec 2021. She said from this point onwards, everyday activities such as cleaning, cooking, eating and socialising took a back seat. She spent a lot of time in bed. She continued with a description of how events at work affected her after 20 Dec 2021; she had a panic attack, she was bed-bound, she was frantic, she was increasingly depressed. The statement went on to describe events after the relevant period.
 10. The claimant relied on her responses to a universal credit capability for work questionnaire which resulted in a decision that she had limited capability for work. She completed the questionnaire on 29 March 2022. In the questionnaire, she said she had suffered anxiety and depression for most of her adult life. It was mostly manageable but she was prone to becoming very unwell. If this was prolonged, she

could not perform basic tasks and slept excessively. She said sometimes she could move about and at other times she felt so tired and exhausted that all she could do was lay down. She said sometimes she experienced brain fog to the point where talking was too difficult. She said sometimes she could not cope with leaving home. She did not say when she experienced these effects.

11. The claimant relied on a letter from the CBFT Psychological Wellbeing Service of 24 June 2022 which recorded that the claimant reported low mood, reduced motivation and suicidal thoughts.
12. The claimant started work for the respondent on 2 Aug 2021 on a 20 hour a week contract. At that time, she was also still working part-time for a University, a position she had started in April 2021, and had a contract with them to work 120 hours from the end of August 2021. The hours she worked each week in this job were not specified. Prior to this, the claimant had a gardening business until 2018. She did air B&B from May 2016 to January 2019. She was out of work from February 2019 to April 2021. The claimant said she could not work full time and had to work part-time, because of her medical condition. She was not challenged on this.
13. Prior to 10 Jan 2022, the claimant had no time off work from the respondent due to illness. She said that on less than 5 days, she did not feel well enough to work and she accommodated this by varying the part-time hours which she worked which she said were flexible.
14. Under cross examination:
 - a. The claimant was asked when her cognitive abilities were first affected in the period. The claimant responded from 20 Dec 2021;
 - b. The claimant said she could not understand why the respondent was behaving the way it did in December 2021, which she relied on as showing the effect of her condition on her cognitive function.
15. The claimant gave further evidence to the Tribunal as follows: She was prescribed citalopram from 2005 to November 2012. She tried to stop the drug and then had a serious breakdown at the start of 2013. She then started sertraline. She tried to stop it in about 2017 but had to start it again and continued its use to the hearing. She was not challenged on this evidence and it is generally corroborated by the GP record, so we accept this.
16. To try to elicit specific information from the claimant, the Tribunal asked her about her ability to undertake day to day activities in the period January 2020 to December 2021. The claimant said at times she could not get out of bed, and she could not cook for herself or do housework. She said she struggled to form sentences when really ill. The claimant was not challenged on this latter point.
17. To try to elicit more specific information, we then asked her about the period April 21 to December 21. She said she did not have the capacity for work full-time as she became ill if she did so; she went to bed during the day every day in this period. Further she had to sleep during the day most days from 2005. (The respondent did ask the claimant about her claim to sleep at work, but apparently in the context of challenging the respondent's knowledge and the claimant's honesty in depriving the respondent of her service by sleeping at work, rather than the claimant's assertion per se, and it did not challenge her on her assertion that she had to sleep most days from 2005). She said her ability to cook for herself in April 21 to December 21 was variable.

She said she started getting meals delivered to her by a charity in June 2021 because of her inability to cook for herself. She said she had struggled to cook for herself since about 2019. She said she did very little housework in the period April 21 to December 21. She said she was unable to do regular housework from 2019; when she was running the air B&B, she had to do it.

18. She said that if she stopped her medication, she would be bed bound. She referred to her breakdown in 2013 after she stopped her medication and said it took her 8 hours to get out of bed, it was a huge undertaking to dress and she could not cook for herself. She was not cross examined on this evidence.
19. The respondent argued in particular that anxiety and depression do not necessarily have a substantial adverse effect on normal day to day activities. It pointed to the fact that over 7 million people were taking anti-depressants in England in 2018.
20. The respondent did not challenge the claimant on its subsequent submission that there was no indication that the adverse effects of her condition increased significantly when she was not on medication.
21. After asking questions of the claimant, we asked her if there was anything else she wanted to say on the issue. The claimant replied in the negative. After the respondent and claimant had both made submissions (the respondent first), the Tribunal moved on to discussing case management issues. At this stage, the claimant asked if she could add something further. In the context, we took this to be a further submission and did not allow this.

Relevant law

22. Section 6(1) EQA sets out the statutory definition of disability: a physical or mental impairment which has a substantial and long-term adverse effect on the employee's ability to carry out normal day-to-day activities. We will use 'SAE' below to mean a substantial effect on the claimant's ability to carry out normal day-to-day activities.
23. Section 212(1) EQA defines 'substantial' as 'more than minor or trivial'.
24. This is supplemented by Schedule 1 Part 1 EQA 'Determination of Disability' which says:
 - a. The effect of an impairment is long-term if it has lasted for at least 12 months, it is likely to last for at least 12 months, or it is likely to last for the rest of the life of the person affected.
 - b. 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.
 - c. 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—
 - i. measures are being taken to treat or correct it, and
 - ii. but for that, it would be likely to have that effect.
 - d. "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

25. When considering disability, the Tribunal must take the statutory guidance, “Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability” (“Guidance”). Guidance is also found in the EHRC Employment Code.

26. The Guidance says that:

- a. (C3) ‘likely’ means ‘it could well happen’;
- b. (C4) In assessing the likelihood of an effect lasting for 12 months, account should be taken of circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood.
- c. (C7) It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the ‘long-term’ element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily. Or other effects on the ability to carry out normal day-to-day activities may develop and the initial effect may disappear altogether.
- d. (D3) 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. Normal day-to-day activities can include general work-related activities, and study and education- related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

27. The burden of proof lies on the claimant to demonstrate that she has a disability under EQA.

Conclusions

28. We find that the claimant had the disability under the EQA of ‘mixed anxiety and depression’ at the relevant time.

29. We have not taken into account any evidence related to the claimant’s medical condition after the relevant period. As the Guidance states: ‘In assessing the likelihood of an effect lasting for 12 months, account should be taken of circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood.’

30. We have taken judicial notice that sertraline and citalopram are anti-depressants.

31. We find that the GP records showed that the claimant’s medical condition continued from 2005 to the end of the relevant period, as shown by her regularly consulting her GP for anxiety and depression throughout this period, apart from 2015 and 2020. We accept the claimant’s evidence that she was taking medication for anxiety and depression continuously from 2005 to the end of the relevant period, apart from two periods when she tried to stop the medication and had to restart it. Therefore, the

condition was long term as at the relevant period. The essential question then is whether there was a SAE for that period.

SAE likely but for medication

32. We find that the claimant's evidence showed that, but for medication, the claimant's anxiety and depression condition would have been likely to have a SAE.
33. The claimant's evidence was that she stopped taking medication in 2012 and she had a serious breakdown in 2013. This is corroborated by the GP records which state that the claimant stopped medication in November 2012 and relapsed. We accept the claimant's evidence that, at the time of this relapse, it took her eight hours to get out of bed, it was a huge undertaking to dress and she could not cook for herself. The claimant was not challenged on this evidence. Getting out of bed, dressing and cooking are all day to day activities which were all impeded or stopped by her medical condition. The respondent submitted that there was no indication that the adverse effects increased significantly when the claimant was not on medication, but did not cross examine the claimant on this, and so we do not accept this submission.
34. We consider that there was nothing in the GP records to indicate that the claimant's medical condition changed fundamentally over the period 2005 to 2022 so as to suggest that the claimant's state of health in 2012/2013 was not indicative of her state of health in the following years. The GP records showed a pattern of periods when the condition appeared to be managed, as in 2015 and 2020 when the claimant did not consult her GP, and periods when it was more severe as in when she relapsed after November 2012, in February 2021 when the claimant felt 'catatonic', and in January 2022, when the claimant had a panic attack and suicidal thoughts. As the Guidance says (C7), a person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period.

Whether SAE irrespective of medication

35. Even when she was taking the medication, we consider that the claimant's condition had a SAE and that this was long term.
 - a. We consider full time working to be a normal day to day activity. The claimant's evidence was that she could not work full time. She was not challenged on this, and we accept her evidence on it. It is corroborated by her job history. Her formal part time working for an employer started in April 2021. Prior to this, she had an extended period without employment and prior to this, was operating air B&B from May 2016 to January 2019 which by its nature would be part-time.
 - b. It was also the claimant's evidence that she had to sleep in the day almost every day from 2005. (Although the respondent challenged the respondent's knowledge of such sleeping, it did not challenge the assertion that the claimant had to sleep in the day almost every day from 2005.) To be unable to stay awake all day would seriously impact on ability to work full-time and is in itself a failure to be able to undertake the normal day to day activity of being awake during normal waking hours.
 - c. As for other activities, the claimant's evidence was not entirely consistent; she was able to do house work while running the air B&B; cooking and cleaning took a 'back seat' from December 2021, suggesting she was doing them before December 2021. However, since the claimant began having a meals delivery in June 2021, she was apparently unable to cook at that time. The claimant said

she struggled to cook for herself from 2019 and that her ability to do so was variable. We consider that this is demonstrated by the claimant starting to have meals delivered in June 2021. As the Guidance says, a person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. We accept the claimant's evidence that her ability to cook for herself was variable from 2019. Relying on the Guidance, we consider that this was a SAE going on from 2019 to the end of relevant period.

Whether long term SAE in relation to cognitive functions and other

36. In her claim form, the claimant relied on the following as putting her at disadvantage in the work place due to her medical condition: needing more time to process information, particularly verbal information; becoming easily confused if things are not explained carefully; being unable to deal with unusual stresses; needing time off work. We do not find she proved that these problems amounted to a long term SAE.
37. When asked by the tribunal on two occasions to give evidence of her ability to undertake day to day activities, the claimant did not mention any of these issues.
38. Under cross examination, the claimant was asked when her cognitive abilities were first affected in the period. The claimant responded from 20 Dec 2021. Although it may have been that the claimant did not understand what the 'period' was, she did not give any information about an effect on her cognitive abilities specifically prior to December 2021.
39. The claimant did not mention any cognitive issues in her impact statement until her description of events from November 2021, which was when her problems in the respondent's workplace started. We do not consider that a description of the claimant's mental state, including shock, confusion, distress, and crying, when faced with particular workplace challenges and criticisms, can be taken as evidence that this was a long term effect of the claimant's medical condition.
40. The claimant gave no evidence that she suffered these issues prior to November/December 2021. The only similar issue which she mentioned was struggling to form sentences, which is not what she relied on in her claim form. (We accept that she did struggle to form sentences when really ill because she was not challenged on this.)
41. We recognise that it may well be that the claimant's medical condition meant that, on a long term basis, she needed more time to process information, particularly verbal information; that she became easily confused if things were not explained carefully; and she was unable to deal with unusual stresses. However, the claimant has not provided the required evidence of this as a long term impact and the burden of proof is on her to do so. The description which the claimant gave of her reaction to workplace problems in the period November 2021 to February 2022 does not assist the Tribunal in determining if the claimant suffered a long term SAE in their regard.

42. As far as the claimant's assertion that she needed time off work as an impact of her condition is concerned, the evidence supported the contrary. The claimant had no days signed off sick prior to 10 Jan 2022 after a distressing phone call at work. She had no other days sick with the respondent prior to that, but accommodated less than 5 days when she felt too unwell to work by adjusting her work schedule.

**Signed electronically by me
13 December 2022**

Employment Judge Kelly

Signed on: 13 December 2022

Sent to the parties on:

20 December 2022

For the Tribunal:

GDJ