EMPLOYMENT TRIBUNALS

Claimant: Mr A Parmar

Respondent: John Lewis Plc

Heard at: **London South**
On: **4 May 2023**

Before: **Employment Judge Heath**

Representation
Claimant: In person
Respondent: Ms G Holden (Counsel)

JUDGMENT

At the relevant time, between 3 May 2021 and 2 August 2021 the claimant was a disabled person for the purposes of section 6 and Schedule 1 of the Equality Act 2010.

REASONS

Introduction

1. An Open Preliminary Hearing ("OPH") was listed by EJ Fredericks at a Case Management Preliminary Hearing ("CMPH") held on 2 November 2022. The purpose of the OPH was to consider:

    a. Whether the claimant's claims, particularly in relation to things done prior to three months before bringing his claim, are brought in time and whether the Tribunal has jurisdiction to hear them;

    b. Whether any of the claimant's claims should be struck out because they have no real prospects of success; and/or

    c. Whether any of the claimant's claims should be made subject to a deposit order as a condition of their continuation; and

d. To conduct any case management as may be necessary in anticipation of the hearing of any surviving claims at the Final Hearing.

2. At the CMPH the claimant was not certain that he would proceed with a disability discrimination claim. However, if he were to proceed with one, the OPH would decide whether he was a disabled person having regards to the statutory definition. This judgment deals solely with this issue. I have dealt with other matters in other documents.

Claims and issues

3. The claimant was employed by the respondent between 3 May 2021 and 21 May 2021. He claims that he was constructively dismissed by the respondent on this latter date, but began working for them as an agency worker. He further claims that he applied for further employed roles with the respondent, but was unsuccessful in his applications.

4. At the CMPH, the claimant was unsure whether he wished to bring a disability discrimination claim. He was given time in which to indicate whether he was pursuing such claim. He subsequently did give such an indication. However, probably because of the claimant's position at the CMPH, no reference to a disability discrimination claim was made in the list of issues.

5. Early in the OPH, it was therefore necessary for the tribunal to establish what the issues in any disability discrimination claim were. Following discussion with the parties, and scrutiny of the ET1, the following claims were identified:

    a. **Breach of the duty to make reasonable adjustments** during the claimant's employment between 3 and 21 May 2021. The allegation appears to be (section 8.2 ET1 at page 8 OPH bundle) that a PCP was applied requiring the claimant to begin work between 8 pm and 12am. This placed him at a substantial disadvantage due to the lack of sleep he experienced because of his mental health issues. A reasonable adjustment would have been to allow him to start work earlier in the band.

    b. **Discrimination arising from disability** while the claimant was an agency worker. On 2 August 2021 the claimant alleges (ET1 continuation sheet at page 14 OPH bundle) he was treated unfavourably by being suspended. He alleges the suspension was for infringements which arose from his disability.

Procedure

6. I was provided with 80 page bundle, further documents relating to driver infringements, further documents relating to applications for permanent roles and a skeleton argument from Ms Holden.

7. The claimant gave evidence and was questioned by myself and by Ms Holden. His evidence was largely concerned with the issue of disability, but he was asked questions relating to time limits.

8. The parties gave closing submissions. The hearing did not conclude until after 3:30 pm and so I reserved my decision.

The law

Disability

9. Section 6 EA provides: -

> *(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*

10. Section 212 EA provides that ""*substantial" means more than minor or trivial".*

11. Schedule 1 Part 1 Paragraph 2 of the EA provides: -

> *1) The effect of an impairment is long-term if—*
> *(a) it has lasted for at least 12 months,*
> *(b) it is likely to last for at least 12 months, or*
> *(c) it is likely to last for the rest of the life of the person affected.*
> *(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur. If*

12. Paragraph 5 of Schedule 1 includes:

> *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 treat or correct it, and*
> *(b)but for that, it would be likely to have that effect.*
> *(2)"Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.*

13. Part 2 of the same schedule obliges tribunals to take account of such guidance as it thinks is relevant. The "*Equality Act 2010 Guidance: Guidance on matters to bet taken into account in determining questions relating to the definition of disability*" (May 2011) (the "Guidance") was issued by the Secretary of State pursuant to s. 6(5) of the EA 2010.

14. The relevant point in time in assessing whether the claimant is disabled under section 6 EA is the time of the alleged discriminatory acts (*Cruikshank v Vaw Motorcast Ltd [2002] ICR 729*). This includes the question of whether the effects of the impairment are long-term (*McDougal v Richmond Adult Community College* [2008] ICR 431).

15. "Likely to recur" means that "it could well happen" (para C3 of the Guidance). The Guidance gives the example (C6) of a woman with two discrete episodes of depression within a 10 month period. She would not be covered by the Act because at this stage the effects of their impairment have not lasted more than 12 months after the first occurrence and there

was no evidence that the episodes are part of an underlying condition of depression which is likely to recur beyond the 12 month period. The Guidance makes the point that if there was evidence to show the two episodes did arise from an underlying condition of depression, the effects of which are likely to recur beyond the 12 month period, she would satisfy long-term requirement.

16. In *J v DLA Piper UK LLP* *UKEAT/0263/09/RN* the EAT observed at paragraph 42: -

> *The first point concerns the legitimacy in principle of the kind of distinction made by the Tribunal, as summarised at para. 33 (3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness – or, if you prefer, a mental condition – which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or – if the jargon may be forgiven – "adverse life events".[We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians – it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod and Dr Gill in this case – and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most laypeople, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para. 40 (2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for twelve months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common-sense observation that such reactions are not normally long-lived*

The facts

17. The claimant is a 48-year-old man born in 1975. His GP records appeared in the bundle, along with three letters from a local provider of talking therapies, Medway Talking Therapies.

18. The claimant had a traumatic childhood, which he has clearly spoken about in consultations with his GP. The details will not be set out here.

19. In 2002 there is reference in the medical records to "phobic anxiety disorders". The claimant was candid that he could not remember anything about this issue, which also recurred in 2006.

20. In October 2010 the claimant saw his GP for a psychiatric assessment following feeling low for months. He declined antidepressant medication, set out some family background and took a PHQ-9 questionnaire. The result of this was a score of 19, which is at the top end of "moderately severe depression". On 1 November 2010 the claimant was prescribed antidepressant medication. On 30 December 2010 the claimant spoke to his GP about work stress during the past year stemming from his beliefs that he had been the victim of racial discrimination. The GP did not believe he was depressed but thought that he may be stressed.

21. The claimant did not see his GP again for mental health related issues until 11 years later, although he did visit his GP for other issues. I accept the claimant's evidence that he does not wish to take antidepressants. I also accept as evidence that just because he did not visit the GP does not mean that he did not have periods where his mental health was not good. He had his ups and downs but felt that he just had to "live with things". The claimant's evidence was that he had certain traits which led him to getting depressed and down, and which he did experience during the period 2011 to 2021.

22. In 2021 the claimant's family business closed with significant financial losses as a result of the pandemic. I accept the claimant's evidence that during this period he felt "useless" and "like a letdown" and that the episode came with "a lot of trauma".

23. On 10 February 2021 the claimant had a telephone consultation with his GP. He made reference to his childhood trauma and expressed worry that he would become mentally unwell like a family member. He agreed to self-refer to talking therapy.

24. On 10 March 2021 the claimant was assessed with Medway Talking Therapies. He scored 20/27 on the PQ-9 depression questionnaire (indicating severe depression) and 15/21 on theGAD7 anxiety questionnaire (indicating severe anxiety). The Psychological Well-being Practitioner who assessed the claimant wrote to his GP on 10 March 2021 observing that the claimant "*presented with severe symptoms of anxiety and low mood. Client reported low self-esteem, past traumatic experiences, and feelings of guilt and regret. Client's mood is also impacting his motivation as well as his sleep and appetite*". The claimant was put on a waiting list for Step 3 Counselling.

25. On 3 May 2021 the claimant took up employment with the respondent. His application was to work on what were, essentially, night shifts as a lorry driver. On 21 May 2021 he gave notice having been told by management that he would not be able to start work earlier. On a couple of occasions in evidence the claimant said that he left the respondent's employment "on good terms".

26. On dates unknown between March and July the claimant attended seven appointments for counselling which was delivered over Zoom and telephone. His final session was 2 July 2021.

27. On 18 May 2021 the claimant attended his GP surgery complaining of insomnia. He said that he was not sleeping well and did not get to sleep at all throughout the night. He said the problem worsened two weeks previously when he works nights and goes to bed early in the morning. He said his mental health was not good.

28. On 2 July 2021 the claimant's counsellor from Medway Talking Therapies wrote to his GP. She identified the presenting problem as being "Depressive episode and generalised anxiety". She set out that he had attended the seven sessions, the final one being on 2 July 2021. She set out his initial PHQ-9 score of 20 and his post-treatment score of 13. This score indicates moderate depression. His initial GAD7 score was 15, and remained so post-treatment. This indicated severe anxiety. The counsellor indicated that the claimant had cancelled some sessions due to work commitments and had been "struggling with his concentration and anxiety".

29. On 20 July 2021, the claimant attended his GP surgery. He spoke of his childhood experiences, indicated he did not want to take medication, said that his sleep was better now that he had stopped working nights, and said his mental well-being had improved. Strategies for further improvement were discussed and he was signposted to local mental health services.

30. In terms of day-to-day activities the claimant had some difficulty in articulating quite how his mental health problems impacted his life. This is not uncommon.

31. The claimant said that he felt paranoid when his mental health was poor. He said, and I accept, that he has always been prone to some paranoia. However, he felt that he was watched during the period of summer 2021 when he incurred infringements. He felt under pressure and anxious when he was asked questions. He tried to minimise contact with others as he lost a lot of trust in them. He denied that his feelings about getting infringements were the normal worry anyone would feel when their work performance was being picked up.

32. The claimant gave evidence that he had PTSD symptoms stemming from his childhood trauma. He said that he always felt in "survival mode". When he was depressed, he did not interact with his family. He said he just sat there and did not communicate with them and was "in a world of my own".

33. The claimant said he lost complete interest in all activities when depressed. He said he would always do some housework and shopping (but not a lot) but did not do this when he felt depressed. He said that it he did not go out at all as a family, and this was not simply to do with pandemic restrictions.

34. It was put to the claimant that is insomnia was linked to working at night, and he agreed that this was potentially the case. He did not agree, however, that night shifts caused insomnia rather than depression.

35. The claimant said that his mental health problems meant that he did not go to the gym. However, he found it difficult to pinpoint when this was, and believed that he stopped going to the gym after he was suspended in August 2021.

36. On 6 October 2021 the claimant attended his GP surgery, where he advised his GP that he was managing his mental health by exercise, eating healthily and had developed coping with conditions when feeling anxious. On 20 October 2021 the mental health nurse at his GP practice wrote a letter indicating that the claimant suffers with his mental health: "*Anxiety, depression and symptoms of PTSD*". She said that stopping working nights "*has significantly improved his mental wellbeing*". On 1 February 2023 the claimant again attended his GP surgery requesting counselling for childhood trauma and building relationships with his family.

37. Going back to the claimant's work with the respondent, after he gave notice, he joined an agency. It appears that he worked for the respondent as a driver through the agency, and had working hours which he found easier to cope with. I saw and heard no evidence of the agency arrangements, though the claimant says he was employed by an agency, and placed with the respondent as an end user.

38. In June, July and August 2021 the claimant incurred a number of infringements relating to working time. On 1 August 2021 he was suspended from working for the respondent due to the number of infringements he had incurred.

39. The claimant also made a number of applications for permanent roles with the respondent. I did not hear detailed evidence on this point, but it appears that most applications were rejected, although one interview was declined by the claimant.

40. On 27 September 2021 the claimant notified ACAS under the Early Conciliation ("EC") procedure. On 7 November 2021 he was provided with an EC certificate. On 5 December 2021 he presented a claim form to the tribunal.

Conclusions

41. The period I am looking at is between May and August 2021.

42. Prior to this, in February 2021 the claimant was clearly struggling with his mental health following on from the collapse of his family business. On 10 March 2021 the claimant completed PHQ-9 and GAD7 questionnaires that indicated that he was experiencing severe depression and severe anxiety that this point in time. There has been no suggestion that the claimant was exaggerating his symptoms when completing these questionnaires, and I take these self-assessments at face value.

43. The claimant has had some difficulty in pinpointing how his mental health problems have affected his ability to carry out day-to-day activities at various points in time. This is entirely understandable. Looking back to a period of time around two years ago and attempting to differentiate how one lived one's life and what differences in behaviour one exhibited to other periods of time are difficult enough for anyone. Add to this undisputed assessment of severe depression and anxiety and the exercise becomes even more difficult.

44. The claimant's evidence was that he was never a great one for household chores, but that when depression hit, he was "in a world of his own" and was entirely unmotivated to do anything around the home or take any active part in family life. He expressed the desire to his GP in February 2021 to "move forward from past and enjoy his family". A diagnosis of severe depression inclines me to accept that the claimant would not have been able to motivate himself to help with such activities as shopping. The Medway Talking Therapies letter of 10 March 2021 refers to the impact on the claimant's motivation as well as his sleep and appetite.

45. The evidence would suggest that counselling helped the claimant with his symptoms of depression. The counselling constitutes "measures" for the purposes of Schedule 1, paragraph 5 EA. I consider that but for the counselling, the claimant would have been likely to continue to experience symptoms of severe depression from May to August 2021. I consider that without this help he is unlikely to have even been able to work for the respondent.

46. Ms Holden submitted that the claimant's insomnia was clearly linked to his working nights and not his depression. The evidence does not support this submission. Again, the letter from Medway Talking Therapies of 10 March 2021 (almost two months before he began night working) refers to how the claimant's mood impacts upon his sleep, among other things. While the evidence also demonstrates that the claimant's sleep patterns improved when he was no longer working nights, this also corresponded to the improvements in his mental health sustained during the course of counselling. While I have no doubt that the working hours played a significant role in affecting the claimant sleep, I also find that his depression had an impact that was more than minor or trivial.

47. Ms Holden similarly submitted that what the claimant described as paranoia was an understandable reaction to the claimant's performance being picked up by management. During the period I am focusing on to determine disability, the claimant experienced symptoms of severe anxiety. I accept his evidence that paranoia is something he has often experienced in his life. This ties in with previous references to anxiety disorders and possibly even to familial history. His description of being in "survival mode" is in keeping with the suggestion of symptoms of PTSD observed by his mental health nurse. I find that it is more than likely that the claimant experienced feelings of anxiety and paranoia which went beyond the normal experiences of people in the workplace whose work is

being taken to task. I find it more likely than not that these feelings impacted the way he interacted with colleagues, making him more vigilant and anxious as he considered himself to be constantly watched.

48. I find that in the period between May and August 2021 the claimant's symptoms of depression and anxiety had a more than minor or trivial effect on his ability to carry out day-to-day activities such as interacting with his family and his colleagues, carrying out household chores, doing shopping and sleeping. I find it more likely than not that there was such an adverse effect, but had he not attended counselling this would be beyond any doubt whatsoever. This is not one of those cases, referred to in *J v DLA Piper,* where there is some "looseness" in terminology in describing impairments. The substantial adverse effects on the claimant's ability to carry out day-to-day activities were because of anxiety and depression, the presenting problems identified by mental health professionals. These are the impairments I find the claimant experienced.

49. I now consider whether or not the effect of the impairments, anxiety and depression, were long-term.

50. The effects of the impairments which the claimant experienced while working for the respondent began, in all likelihood at the beginning of 2021. It is likely that he experienced before 10 February 2021 when he went to his GP.

51. His GP noted improved mental well-being on 28 July 2021, and no concerns were noted in October 2021. What is not known is what effect the impairments would have had but for his counselling. This hypothetical is extremely difficult to gauge without the assistance of expert evidence. On the face of it, and putting things fairly neutrally, the claimant appears to have experienced the effects of symptoms of depression and anxiety for around six months.

52. This episode of poor mental health does, however, have a context. The claimant had a traumatic childhood, appears to show symptoms of PTSD, experienced anxiety disorders requiring medical attention in 2002 and 2006 (albeit ones which, candidly, he was unable to give meaningful evidence about) and he experienced severe depression 2010 and 2021 and severe anxiety in 2021. There are references in his medical records to his resistance to taking antidepressants. I find that this is in keeping with the evidence that the claimant gave that not seeing a doctor about mental health issues between 2010 and 2021 did not mean that he did not experience mental health difficulties. I accept the claimant's evidence that he had "ups and downs" in this period which I find were recurrences of bouts of depression. On balance of probabilities, the childhood trauma and presence of phobic anxiety disorders is suggestive that anxiety is likely to have been a recurrent issue for him and not something emerging from a clear blue sky on a couple of isolated occasions in his life.

53. The picture made up by the evidence is not a perfect one. But there are strong indicators of a history of an underlying depressive condition

whereby the claimant experiences recurrent bouts of depression and periods of elevated anxiety. It is highly likely that stressful life events such as perceptions of discrimination in employment and the collapse of the family business bring depressive and anxious symptoms to the fore. Doing as best as I can to place myself at a vantage point located in the summer of 2021, posing myself the question whether the effects of the impairments of depression and anxiety "could well recur", I find, on balance, that their recurrence was likely.

54. In the circumstances, I find that the claimant satisfied the definition of a disabled person in May and August 2021.

Employment Judge **Heath**

9 May 2023