



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103224/2022

Held in Glasgow on 20 to 22 March, 14, 17, and 18 April 2023

Employment Judge S MacLean

5

Mr James Hammond

**Claimant
In Person**

10

Barclays Execution services Limited

**Respondent
Represented by:
Mr D Hay, Advocate
Instructed by:
Mr L Davis –
Solicitor**

15

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant was a disabled person between 3 November 2019 and 20 January 2022 in terms of section 6 of the Equality Act 2010.

20

REASONS

Introduction

1. This public preliminary hearing was listed to decide if the claimant was a disabled person between 3 November 2019 when he commenced a period of sick absence until 20 January 2022 when his employment terminated (the relevant period).
2. The claimant had been ordered to provide a disability impact statement. He had been unable to comply with this order. However, at the preliminary hearing on 16 January 2023 it was anticipated that if the claimant was unable to provide a disability impact statement he would come to this preliminary hearing and give his evidence orally.

25

30

3. The claimant and Mr Hay, counsel for the respondent attended the preliminary hearing in person. The claimant gave evidence on his own account. He was cross-examined in the usual way. Ian Hammond, the claimant's father, gave evidence remotely by Cloud Video Platform.
- 5 4. The respondent had prepared files of documents that included correspondence; occupational health reports; statements of fitness to work; the claimant's medical records and a psychological report. The claimant also prepared a supplementary file of documents.

The issues

- 10 5. The claimant alleges acts of discrimination from 3 November 2019 until 20 January 2020.
6. The issues that I had to determine were:
- (a) Did the claimant have a mental or physical impairment? The claimant asserts that he had a mental impairment: complex post-traumatic stress disorder (PTSD). His background anxiety and depression contribute to that complexity.
- 15 (b) Did the impairment affect the claimant's ability to carry out normal day to day activities?
- (c) Was the adverse condition substantial?
- 20 (d) Was the adverse condition long term in that it has lasted 12 months; it is likely to last for at least 12 months; or is likely to last the rest of the life of the person affected?

The relevant law

7. Section 6(1) of the Equality Act 2010 (the EqA) provides that 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 the person's ability to carry out normal day to day activities.' The burden of proof is on the claimant to show that he satisfies the definition.
- 25

8. The statutory definition of 'substantial' in section 212(1) of the EqA is, 'more than minor or trivial'.
9. Supplementary provisions for determining whether a person has a disability are found in part 1 of schedule 1 to the EqA. For example, schedule 1,
5 paragraph 2 provides that the effect of an impairment is long-term if it has lasted at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person. Further if the impairment ceases to have a substantial adverse effect on a person ability to carry out normal day to day activities, it is treated as continuing to have that effect if it is likely to recur.
10
10. Schedule (1) paragraph 5 provides that an impairment is treated as having a substantial adverse effect on the ability of the person concerned if measures are taken to correct it and but for that it would be likely to have that effect.
11. The Equality Act 2010 (Disability) Regulations 2010 SI 2010/2128 specifically
15 exclude from the scope of the EqA a number of conditions that otherwise might well constitute disabilities under the EqA including addiction to alcohol, nicotine or any other substance, unless the addiction was originally the result of the administration of medically prescribed drugs or other medical treatment (regulation 3). 'Addiction' includes a dependency (regulation 2).
- 20 12. The definition of disability in section 6(1) of the EqA requires that the adverse effects on a person's ability to carry out normal day to day activities arises from some 'physical or mental impairment'.
13. There is no statutory definition of either 'physical impairment' or 'mental impairment' nor is there government guidance.
- 25 14. The Court of Appeal held in *McNicol v Balfour Beatty Rail Maintenance Limited* 2002 ICR 1498 that 'impairment' in this context bears its ordinary and natural meaning. "It is left to the good sense of the tribunal to make a decision in each case on whether the evidence available establishes that the [claimant] has a physical or mental impairment with the stated effects."

15. The Government has issued 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011) (the Guidance) under section 6(5) of the EqA.
- 5 16. The Equality and Human Rights Commission (EHRC) has published a Code of Practice on Employment (2011) (the Code), which has some bearing on the meaning of 'disability' under the EqA. Like the Guidance, the Code does not impose legal obligations, but tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.
- 10 17. The time at which to assess the disability (i.e. whether there is an impairment that had a substantial adverse effect on normal day to day activities) is the date of the alleged discriminatory act *Cruickshank v VAW Motorcast Ltd 2002 ICR 729, EAT*. This is also the material time when determining whether the impairment has a long-term effect.

15 **Findings in fact**

Background

18. While living in England the claimant was diagnosed with depression in early 2010 but relayed having symptoms since childhood following the death of his sister.
- 20 19. The claimant was prescribed anti-depressants in 2010 which after a few weeks triggered a seizure. The claimant consulted a neurologist in May 2010 who advised that the claimant was borderline epileptic and was advised against taking anti-depressants as to do so carried the risk of a seizure. He was also advised against taking alcohol. The claimant had no drugs or alcohol misuse. The claimant attended counselling sessions.
- 25
20. In 2012 the claimant had another unexpected bereavement which resulted in a deterioration in his mental health. The claimant attended counselling five times per week gradually reducing to three times per week.

21. The claimant had a small group of friends from university with whom he kept in contact. The claimant played football several times each week. He cycled to/from work. The claimant found being outdoors and exercising therapeutic for his mental health. He found socialising challenging unless it was task focussed. The claimant avoided interacting with people especially when it involved drinking alcohol.
22. In the summer of 2014 there was a dawn raid on the claimant's flat following which, his house mate was arrested and subsequently imprisoned. The claimant felt a sense of loss. The claimant struggled with social interaction particularly when it involved describing his housemate's absence and the reasons for it.
23. Following encouragement from a friend from university, the claimant moved to Scotland in 2015. He registered with a local general practitioner (GP) who did not have access to claimant's medical records with NHS England.
24. The claimant initially stayed with his friend who became a work colleague then the claimant's line manager. Their relationship deteriorated when the friend separated from his wife and the friend left Glasgow. The claimant moved to rented accommodation.
25. Another of the claimant's friends from university died unexpectedly in April 2016. The further sudden shocking absence was a blow to the claimant's mental health.
26. By August 2016 the claimant felt that he needed to live alone. The claimant found this more peaceful. He rented a flat which he eventually purchased.
27. The claimant was employed by the respondent from October 2016. The claimant tried to socialise with his work colleagues and make a good impression.
28. The claimant continued to play football and cycle. He found this exercise cathartic. It was a good indicator of the turbulence in his mood. It helped the claimant put events into perspective and was a 'wind sock' of trouble ahead.

29. The claimant had a strict routine for preparing for work and what he would prepare to eat for lunch each day. The claimant was disciplined in his routines. He was house proud. He had a weekend cleaning schedule to which he had to adhere. The claimant had difficulty dealing with chores when there was no routine or structure to his day
30. The claimant was absent from work due to work related stress from February to May 2018. The claimant was referred to occupational health on 10 April 2018 in relation this absence.
31. During this period the claimant had difficulty getting out of bed some days. He lacked enthusiasm for doing chores or engaging in activities that he found usually helped his wellbeing.
32. The claimant returned to work on a phased basis on 7 June 2018. The claimant was discharged from occupational health on 6 August 2018.
33. The claimant sought alternative roles with the respondent. He struggled to deal with customer complaints and people. He avoided spending money and did not want to socialise. He feared losing people and preferred to be alone.
34. The claimant was appointed to a new role in early 2019 which the claimant found interesting. A structure returned to his routine. He was less anxious about his financial circumstances and was able to exercise.
35. Around September 2019 the claimant was stressed at work and felt this seeping into his life.

Relevant time 3 November 2019 to 20 January 2022

36. The claimant had a further bereavement on 3 November 2019. The claimant felt like he was hit by a train. His friend (from university) who was a healthy person had died unexpectedly from a cardiac arrest. The claimant was absent from work.
37. The claimant broke his wrist. He was anxious about travelling as he lacked confidence. He asked his parents for support in making plans. The claimant

found it problematic communicating with people. He could not deal with Christmas and returned home to be alone.

38. The claimant's sleeping pattern was erratic and had difficulty completing tasks. He tried to exercise but had difficulty doing so with his broken wrist. The claimant felt worse when he was unable to exercise. He was emotional and this impacted his limited social interactions.
39. The claimant was not taking any drugs. He was trying to find a psychologist as this therapy had help him in the past. The claimant felt that his recovery from the impact of the bereavement in November 2019 was slower than he has experienced in the past. From previous episodes he knew that he had to push through. He was fearful about the time it was taking to recover. The claimant knew that he needed to get his head and heart in the same place. He needed structure; good sleep, exercise and healthy diet.
40. The claimant felt that he needed to speed up his recovery. He used ketamine. He was self-medicating within limits for medical reasons.
41. The claimant had a further bereavement in early March 2020. He was very distressed.
42. From 23 March 2020 there were restrictions in place due to the COVID-19 pandemic. The claimant tried with difficulty to undertake exercise at home. He had difficulty concentrating and did not eat properly.
43. The claimant continued to use ketamine medicinally. While the claimant anticipated that this would speed up his recovery that did not happen. The claimant required to take ketamine more regularly. The claimant was candid to his GP, psychologist, and occupational health about how he used ketamine. The claimant felt that the language used in medical records and report were judgmental. The claimant felt that his use of ketamine was short term to stop a downward spiral. He considered that was able to stop using ketamine when he wanted to do so.
44. The claimant was diagnosed with complex post-traumatic stress disorder in May 2020. The claimant stopped seeing the psychologist in September 2020

as the advice was that the claimant was to 'keep doing what you're doing, it's working'. The claimant had attended 25 sessions since February 2020.

- 5 45. The claimant was lonely but reluctant to speak to anyone. He found it hard to communicate and lacked patience. He felt scolded. The claimant had little or no social life.
46. The claimant stopped using ketamine in November 2020. He was able to leave the house daily for exercise. He avoided people and would cycle at night. His sleep pattern was reasonable. He had difficulty focussing on the task in hand.
- 10 47. In April 2021 the claimant was able to leave the house daily for exercise. He continued to experience disturbed sleep and his mood, concentration and focus were impacted.
48. The claimant was very lonely but actively avoided people. He was demotivated and felt 'unfairly disbelieved'. He stopped looking after himself.
15 He would avoid shopping unless it was a quiet time. The claimant watched television but lost concentration.
49. Around June 2021 the claimant used ketamine intermittently for short-term antidepressant effect when he was alone and felt isolated.
50. The claimant continued to have difficulty interacting with the various
20 organisations that he required to deal with when attempting to return to work. He found having to repeatedly discuss past traumatic events with different people very challenging. The claimant had no social network or family close by.

Observations on evidence

- 25 51. I considered that the claimant gave his evidence honestly based on his recollection of events. While I tried to assist by asking questions, the claimant found it easier to give his evidence in the form of a narrative. He also answered cross examination questions to the best of his ability.

Deliberations

52. I am focusing solely on establishing whether the impairment in question constituted a 'disability' within the meaning of section 6(1) of the EqA at the time of the alleged discriminatory acts.

5 53. Impairment bears its ordinary and natural meaning and may result from an illness or consist of an illness. There is no need to establish a medically diagnosed cause for the impairment. What is important to consider is the effect of the impairment not the cause. Disability may include someone who is not in fact disabled if, without medical treatment, they are in fact receiving
10 and they would suffer that disability.

54. The material time for establishing disability (i.e., whether there is an impairment which has a substantial and long-term adverse effect on normal day to day activities) is the date of the alleged discriminatory acts(s)). This is also the material time when establishing whether the impairment has a long-
15 term effect.

55. The test is functional and not a medical test, directed to what a claimant cannot or can no longer do at a practical level.

56. The burden of proving disability lies with the claimant. My assessment of his situation must be taken at the time he says the claims arose: 3 November
20 2019 to 20 January 2022 (the relevant time).

57. I refer to the list of issues that I had to determine.

Did the claimant have an impairment?

58. Dealing first with the issue of impairment, it was undisputed that the claimant suffered from complex PTSD and did so at the relevant time. The claimant
25 also had a background of anxiety and depression. I was satisfied that the claimant had a mental impairment.

Did the impairment have an adverse effect on his ability to carry out normal day to day activities?

59. I then turned to consider whether the mental impairment had an adverse effect on the claimant's ability to carry out normal day to day activities.

5 60. The claimant gave evidence about the medical difficulties that he encountered when prescribed anti-depressants and how over the years he had developed strategies such as counselling, intense exercise, and healthy diet to help him hold back any downward spiral and assist him getting back on track.

10 61. The claimant's mental impairment means that his behaviours are highly routinised. He has difficulty with day to day living when these routines are disrupted. While the claimant makes an effort to socialise with colleagues and acquaintances his fear of loss and structured lifestyle means that he has trouble building and retaining friendships.

15 62. When the claimant is on a downward spiral, usually after a sudden bereavement, and his ability to exercise either through poor physical health or restrictions is compromised, he struggles with looking after himself and interacting with people. At its worse the claimant only left his house at night; did not eat properly; and struggled with household chores and day to day living.

20 63. The complication is that between January 2020 and November 2020 the claimant used ketamine. The claimant was self-mediating. I was mindful that that the GP medical records, psychologist report, and occupational health reports to which I was referred in this period relates to remote consultations with the claimant. While there was a record of what the claimant said to
25 healthcare professional almost all of the consultations were conducted by telephone.

64. The claimant took issue with the language used and assumptions made by the healthcare professionals in their discussions with him and records. He did not dispute that during this period he used ketamine as he considered that
30 this would help speed up the time it took him to be able to return to a routine

and put in place strategies that aid him to plan his life. I had no doubt that the claimant considered that using ketamine was beneficial to aspects of his symptomology. He was aware of the potential side effects of his use of ketamine.

5 65. I accept that there is an interrelationship with the effects of his mental
impairment and regular use of ketamine between January and November
2020. The claimant has had significant issues with his mental health for most
of his life. His complex PTSD with background depression and anxiety at its
10 height causes lack of motivation to get out of bed and leave the house . He
has disturbed sleep, lack of motivation and loss of enjoyment in life. The
claimant on his own volition stopped using ketamine in November 2020. My
understanding was that at this point he did not consider that there was any
therapeutic benefit. While the claimant was more engaged with people and
was trying to return to work he continued to have difficulty with his day to day
15 living. The claimant used ketamine intermittently from June 2021.

66. In terms of the statutory guidance, the focus is not on what the claimant could
do but what he could not do or could only do with difficulty.

67. While the claimant appeared to be at his lowest ebb while using ketamine
regularly it also coincided with the national lockdown which restricted the
20 claimant's ability to use other strategies to avoid a downward spiral. I was not
on the evidence before me convinced that had the claimant not been using
ketamine his mental impairment would not have had an adverse effect on his
day-to-day activities. The claimant was unable to attend work even remotely;
he avoided social interaction; avoided going out during the day; had disturbed
25 sleeping and no routine. These are normal day to day activities and are ones
which must be considered in deciding that they show disability. The claimant
was able to do these things to some extent, but only with difficulty. I
considered that there was an adverse effect on his ability to do these
activities.

Was the effect substantial?

68. In my view, the seriousness of the effects varied over the relevant period. Even when not at their worst they had a significant effect on his ability to focus on domestic tasks and self-care, socialise and have enjoyment of life. On the basis of the claimant's evidence and the medical records, I considered that throughout the period 3 November 2019 to 20 January 2022 his mental impairment had an effect on his day-to-day activities as described above that was more than minor or trivial.

Was the substantial adverse effect long-term?

69. I must also consider whether the substantial adverse effect was long-term. I consider that the claimant has had a mental impairment since childhood. The substantial adverse effect of the mental impairment fluctuates but is at its worse following a sudden and unexpected bereavement. I considered that the substantial adverse effect of the mental impairment started around 3 November 2019. As I am considering specifically the period from November 2019 to January 2022 this is more than twelve months and meets the statutory criteria for being considered as long term.

70. Based on the evidence that has been provided, the claimant has suffered increasing symptoms. At this stage there is no evidence to support any finding that that the symptoms will be alleviated or that that the claimant will make a significant recovery.

71. I concluded that the claimant had met the criteria and had a disability (mental impairment) during the relevant time.

72. In conclusion, the claimant has a disability and the claim can proceed.

Employment Judge: S MacLean
Date of Judgment: 07 June 2023
Entered in register: 07 June 2023
and copied to parties