



# EMPLOYMENT TRIBUNALS

**Claimant:** ASR

**Respondent:** LQK Euro Car Parts Limited

**Heard at:** Southampton

**On:** 23.05.2023

**Before:** Employment Judge David Hughes

## Representation

Claimant: In person, assisted by Charlene Howland, friend

Respondent: Anna Greenley, counsel

**JUDGMENT** having been sent to the parties on 30.05.2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. This case comes before me by order of Employment Judge Smail dated 08.03.2023. On that date, EJ Smail ordered that this hearing take place, and identified the following issues to be determined today:
  - a) Whether the Claimant was a disabled person at relevant times to the claim;
  - b) If so, the Claimant's application to amend the issues in respect of claims of disability discrimination, if made;
  - c) The interrelationship between these proceedings and the High Court proceedings and the sequence of dealing with the claims;
  - d) further case management orders in general, but including –
  - e) Whether any r.50 orders need to be made. There is no application yet for the same.

2. I canvassed the above issues with the parties at the outset of today's hearing, and indicated that those were what I would consider today.
3. This is my decision on the question of disability.
4. Consistently with the provisions of a Case Management Order I made at the hearing of the above, the Claimant has been anonymised, pursuant to to rules 50(1) and (3)(b) of the Employment Tribunals Rules of Procedure 2013, Arts 8 and 10 of the European Convention on Human Rights, s1 of the Sexual Offences (Amendment) Act 1992 and s11 of the Employment Tribunals Act 1996.

Facts relevant to today's hearing

5. The Claimant was employed by the Respondent from 14.10.2019 to 01.1.2022. The relevant dates for today's purposes are agreed to be from September 2021 to 02.12.2021. She contends that, at all relevant times, she suffered from anxiety, depression and PTSD. She contends that these conditions have a substantial and long-term effect on her ability to carry out normal day-to-day activities, and that they meet the definition of "disability" provided by s6 of the Equality Act 2010.
6. The Respondent contends that the Claimant's claim for discrimination on the ground of disability was presented out of time. That is not one of the issues to be determined today.
7. The Respondent does not admit that the Claimant is disabled within the meaning provided for by the Equality Act. It does not accept that the Claimant has a physical or mental impairment, or alternatively avers that any such impairment – which it says (in the same paragraph of its Grounds of Resistance as the non-admission) is "*denied*" – does not have a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities.

8. The facts of this case arise out of an alleged incident on 19.12.2019, in which the Claimant says she was sexually assaulted. The Claimant's case is that, after the incident, she struggled with her mental health.
9. This incident is also the subject of litigation before the civil courts. It was referred to by Employment Judge Smail as being before the High Court, but I was given to understand that the proceedings have been issued in the county court.
10. It is not for me to decide whether any such incident occurred, or, if it did, the details of it. I do, however, note that an investigation was held into the Claimant's allegation re this incident, which made findings that an individual engaged in non-consensual sexual activity with the Claimant on 19.12.2019.
11. In the investigation report, the Claimant is recorded as describing how she felt during the incident as follows:

*Scared. Fear is the most overwhelming feeling I had.*

12. Asked how she felt at the date of the report – August 2021 – she said, inter alia,

*(a) "A million different things – stupid, and scared about what is going to happen now. I feel disgusting. Who else knows about this? Who was he sending those photos to? What if those people are in the company? It is degrading"....*

...

*(c) "He has ruined who I was. I am never going to be me again. The way I look at the world, work and other men. I have lost confidence. It is endless what he has done"....*

13. The Claimant relies on a psychological report prepared by Dr Rachel Tanner, a Clinical Psychologist. The report is dated January 2023.
14. Dr Tanner's conclusions were based on the Claimant's self-reporting only. In the immediate aftermath of the incident, Dr Tanner has the Claimant

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describing herself as being frozen, shocked, numb and upset during the incident. After it, she experienced intrusive thoughts about it, including intrusive flashbacks, and recurrent nightmares. These happened daily. She avoids stimuli associated with the incident, and seeks to avoid conversations about it and the individual concerned. She has become significantly less interested in usual and important activities, and felt detached and estranged from other people. She has had difficulty in dealing with her feelings, although she described her husband as very supportive. She has persistent feelings of increased arousal, with some disturbance of sleep and some loss of concentration.

15. The Claimant's mood has been affected. She has increased feelings of vulnerability, she feels worthless and has low self-esteem, she has a reduced appetite and feels lethargic. She is tearful.
16. The Claimant described being generally more anxious, and went from being bubbly and confident to withdrawn.
17. Dr Tanner also describes the Claimant's reported symptoms in the two weeks immediately before the report. These include stress symptoms, frequent thoughts and dreams about the incident, which Dr Tanner considered still to be clinically significant; mood disturbance – Dr Tanner thought the Claimant was clinically depressed, and generalised anxiety.
18. She has seen her GP a number of times, and the extracts of her records included in Dr Tanner's report show her to have been undergoing treatment for depression and anxiety, including medication such as Citalopram, having previously been prescribed Sertraline.
19. Dr Tanner says that the incident met criterion (a) for PTSD/Acute Stress Disorder, i.e. a life-threatening event with response of intense fear. She considers that the psychological symptoms displayed by the Claimant would have fulfilled the diagnostic criteria for PTSD and Major Depressive Disorder.
20. It is not disputed that the Claimant did not seek help from her GP about the impact of this incident until 16<sup>th</sup> September 2020. On that date, she

filled in an electronic self-referral form. In the time between the incident and that date, and indeed thereafter, the Claimant agreed that she had often gotten in touch with her GP about back pain, although due to the Covid-19 situation she did not see her GP face to face.

21. After the entry for 16<sup>th</sup> September, there is a reference to generalised anxiety disorder on 21.12.2021.
22. The Claimant told me, and I accept, that she did not tell her husband about the incident until about April 2020. Her husband was extremely supportive of her, and encouraged her to contact the police, but she was very reluctant to do so. The Claimant said, and I accept, that she did not tell her GP about the incident because she found it very tough to do so. This is consistent with the descriptions of how she felt after the incident, and at the time of the investigation report, to which I have already referred.
23. Also in April 2020, the Claimant contacted Victim Support. Later, in August 2020, she contacted the police, to report the incident.
24. In her Disability Impact Statement, the Claimant describes difficulty sleeping, specifically struggling to fall asleep. This continued to the date of the DIA. The consequent tiredness impacted both on her work and on her personal life. She developed a fear of socialising and being in public spaces, describing how the world became a scary place for her. The shock of the betrayal of trust in the incident, and a sense of shame, played on her mind. She described going out as little as possible. She also describes a lack of concentration and an inability to organise herself.
25. The Claimant was asked about work events that she attended after the incident, set out in the Respondent's Grounds of Resistance. The Respondent's counsel put to her that she was not required to attend these events. The Claimant's evidence was that, in reality, she was required to do so, attendance was part of her job, to at least one she was specifically asked to go, and if she had not gone, she would have risked missing her sales targets. She described her husband having to accompany her to a train to London, speaking with him constantly through the journey

(coverage allowing) and become tearful on the train. She also described having to have a colleague meet her when she arrived in London.

26. One must always be very careful about placing reliance on demeanour. But, even with that caution, the Claimant struck me as an impressive witness. She appeared to me to be nervous when giving evidence, but she readily agreed with appropriate points made by counsel for the Respondent. I find that she was both an honest and a reliable witness, and I accept her evidence.

## Law

27. The Sexual Offences (Amendment) Act 1992, ss1 & 2, provides as follows:

**1.—. Anonymity of victims of certain offences.**

(1) *Where an allegation has been made that an offence to which this Act applies has been committed against a person, [no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the person against whom the offence is alleged to have been committed.]1[...]*

(2) *Where a person is accused of an offence to which this Act applies, no matter likely to lead members of the public to identify a person as the person against whom the offence is alleged to have been committed (“the complainant”) shall during the complainant's lifetime [be included in any publication.*

(3) *This section—*

(a) *does not apply in relation to a person by virtue of subsection (1) at any time after a person has been accused of the offence, and*

(b) *in its application in relation to a person by virtue of subsection (2), has effect subject to any direction given under section 3.*

(3A) *The matters relating to a person in relation to which the restrictions imposed by subsection (1) or (2) apply (if their inclusion in any publication is likely to have the result mentioned in that subsection) include in particular—*

(a) *the person's name,*

(b) *the person's address,*

(c) *the identity of any school or other educational establishment attended by the person,*

(d) *the identity of any place of work, and*

(e) *any still or moving picture of the person.*

(4) *Nothing in this section prohibits the [inclusion in a publication]<sup>1</sup> of matter consisting only of a report of criminal proceedings other than proceedings at, or intended to lead to, or on an appeal arising out of, a trial at which the accused is charged with the offence.*

## **2.— Offences to which this Act applies.**

(1) *This Act applies to the following offences against the law of England and Wales*

(aa) *rape;*

(ab) *burglary with intent to rape;*

(a) *any offence under any of the provisions of the Sexual Offences Act 1956 mentioned in subsection (2);*

(b) *any offence under section 128 of the Mental Health Act 1959 (intercourse with mentally handicapped person by hospital staff etc.);*

(c) *any offence under section 1 of the Indecency with Children Act 1960 (indecent conduct towards young child);*

(d) *any offence under section 54 of the Criminal Law Act 1977 (incitement by man of his grand-daughter, daughter or sister under the age of 16 to commit incest with him);*

(da) *any offence under any of the provisions of Part 1 of the Sexual Offences Act 2003 except section 64, 65, 69 or 71;*

(db) *any offence under section 2 of the Modern Slavery Act 2015 (human trafficking);*

(e) *any attempt to commit any of the offences mentioned in paragraphs [(aa)]<sup>4</sup> to [(db)]<sup>5</sup>;]<sup>6</sup>*

(f) *any conspiracy to commit any of those offences;*

(g) *any incitement of another to commit any of those offences [;]<sup>7</sup>*

(h) *aiding, abetting, counselling or procuring the commission of any of the offences mentioned in paragraphs (aa) to (e) and (g).*

(2) *The provisions of the Act of 1956 are—*

(a) *section 2 (procurement of a woman by threats);*

(b) *section 3 (procurement of a woman by false pretences);*

- (c) section 4 (administering drugs to obtain intercourse with a woman);
  - (d) section 5 (intercourse with a girl under the age of 13);
  - (e) section 6 (intercourse with a girl between the ages of 13 and 16);
  - (f) section 7 (intercourse with a mentally handicapped person);
  - (g) section 9 (procurement of a mentally handicapped person);
  - (h) section 10 (incest by a man);
  - (i) section 11 (incest by a woman);
  - (j) section 12 (buggery);
  - (k) section 14 (indecent assault on a woman);
  - (l) section 15 (indecent assault on a man);
  - (m) section 16 (assault with intent to commit buggery);
  - (n) section 17 (abduction of woman by force).
- (3) This Act applies to the following offences against the law of Northern Ireland—
- (a) rape;
  - (b) burglary with intent to rape;
  - (c) any offence under any of the following provisions of the Offences against the Person Act 1861—
    - (i) section 52 (indecent assault on a female);
    - (ii) section 53 so far as it relates to abduction of a woman against her will;
    - (iii) section 61 (buggery);
    - (iv) section 62 (attempt to commit buggery, assault with intent to commit buggery or indecent assault on a male);
  - (d) any offence under any of the following provisions of the Criminal Law Amendment Act 1885—
    - (i) section 3 (procuring unlawful carnal knowledge of woman by threats, false pretences or administering drugs);
    - (ii) section 4 (unlawful carnal knowledge, or attempted unlawful carnal knowledge, of a girl under 14);
    - (iii) section 5 (unlawful carnal knowledge of a girl under 17);
  - (e) any offence under any of the following provisions of the Punishment of Incest Act 1908—
    - (i) section 1 (incest, attempted incest by males);
    - (ii) section 2 (incest by females over 16);
  - (f) any offence under section 22 of the Children and Young Persons Act (Northern Ireland) 1968 (indecent conduct towards child);



(g) any offence under Article 9 of the Criminal Justice (Northern Ireland) Order 1980 (inciting girl under 16 to have incestuous sexual intercourse);

(h) any offence under any of the following provisions of the Mental Health (Northern Ireland) Order 1986—

(i) Article 122(1)(a) (unlawful sexual intercourse with a woman suffering from severe mental handicap);

(ii) Article 122(1)(b) (procuring a woman suffering from severe mental handicap to have unlawful sexual intercourse);

(iii) Article 123 (unlawful sexual intercourse by hospital staff, etc. with a person receiving treatment for mental disorder);

(hh) any offence under any of the following provisions of the Criminal Justice (Northern Ireland) Order 2003—

(i) Article 19 (buggery);

(ii) Article 20 (assault with intent to commit buggery);

(iii) Article 21 (indecent assault on a male);

(ha) any offence under any of [sections 15 to 21, 47 to 53, 66, 67, 70 and 72 of the Sexual Offences Act 2003]<sup>12</sup>;

(hb) any offence under—

(i) any provision of Part 2, 3 or 4, or

(ii) Article 65, 66, 67, 70, 71, or 74,

of the Sexual Offences (Northern Ireland) Order 2008;

(hc) any offence under section 2 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015;

(i) any attempt to commit any of the offences mentioned in paragraphs (a) to (hc) ;

(j) any conspiracy to commit any of those offences;

(k) any incitement of another to commit any of those offences;

(l) aiding, abetting, counselling or procuring the commission of any of the offences mentioned in paragraphs (a) to (i) and (k).

(4) This Act applies to an offence under section 42 of the Armed Forces Act 2006 if the corresponding offence under the law of England and Wales (within the meaning given by that section) is an offence within a paragraph of subsection (1) above.

28. The Sexual Offences Act 2003, s3, provides as follows:

**3 Sexual assault**

- (1) *A person (A) commits an offence if—*
  - (a) *he intentionally touches another person (B),*
  - (b) *the touching is sexual,*
  - (c) *B does not consent to the touching, and*
  - (d) *A does not reasonably believe that B consents.*
- (2) *Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.*
- (3) *Sections 75 and 76 apply to an offence under this section.*
- (4) *A person guilty of an offence under this section is liable—*
  - (a) *on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;*
  - (b) *on conviction on indictment, to imprisonment for a term not exceeding 10 years.*

29. The Equality Act 2010, s6, provides as follows:

**6 Disability**

- (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.*
- (2) *A reference to a disabled person is a reference to a person who has a disability.*
- (3) *In relation to the protected characteristic of disability—*
  - (a) *a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;*
  - (b) *a reference to persons who share a protected characteristic is a reference to persons who have the same disability.*
- (4) *This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—*

*(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and*

*(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.*

*(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).*

*(6) Schedule 1 (disability: supplementary provision) has effect.*

30. Counsel for the Respondent referred me to Anwar -v- Tower Hamlets College UKEAT/0091/10 [2011] All ER (D) 101 (Nov), as authority for the proposition that an impairment may be more than trivial, yet still minor rather than substantial. I was also referred to Condappa -v- Newham Healthcare Trust [2001] All ER (D) 38 (Dec), emphasising that what is required is substantial adverse effect, nor merely any adverse effect.

31. Counsel also referred me to Tesco Stores Ltd -v- Tennant UKEAT/01617/19, that the impairment must have long-term effect at the time of the alleged acts of discrimination, although counsel acknowledged that the definition of disability is also met if the Claimant can show that at the relevant time, her condition was likely to last 12 months or the rest of her life.

32. It is the effect of the impairment that I am required to consider, rather than just the impairment itself: Seccombe -v- Reed in Partnership EA-2019-000478-00.

### Consideration of the issues

33. The Respondent rightly points out that I must concentrate on the question of whether the Claimant was disabled at the relevant time.

34. Counsel for the Respondent contends that, to find that the Claimant was disabled at the relevant time, I would have to ignore what she describes as “*objective evidence*”. By that, she meant the lack of any mention of the incident or its consequences to the Claimant’s GP until September 2021, and the lack of any issues re performance in the workplace.

35. I do not accept the Respondent's argument. The absence of any communication to the Claimant's GP about the incident is not surprising, given the nature of the incident. I am mindful that I should not decide today more than I need to decide. But it seems to me to be wholly unrealistic to attempt to separate the nature of the incident from a consideration of the Claimant's response to it. The Claimant told me, and I have accepted, that she did not tell her husband about it until April 2020. That same month, she contacted Victim Support. The sentiments described in the investigation report – which is dated shortly before the relevant period to this case – explain these matters.
36. The Respondent also contends that, although there may have been a reaction after the incident, and also during the investigation and/or after she resigned, it does not follow that the Claimant suffered from any physical or mental impairment from September to 02.12.2021.
37. That argument strikes me as superficial. It invites me to conclude that the Claimant suffered from an impairment in the aftermath of the incident, and/or when she made a complaint, and/or during the investigation into the complaint, and/or after she resigned, but had an oasis of mental wellness in the period September to December 2021. That is highly improbable, and I find that it was not so. I find that the Claimant suffered from the impairments she describes in her DIA.
38. I accept Dr Tanner's report, and its conclusions. I am satisfied that, since December 2019, the Claimant has suffered from PTSD and a Major Depressive Disorder. I am satisfied that she has suffered from anxiety in the same time period. I am satisfied that that she suffered from those conditions in the relevant time period.
39. Did those impairments have a substantial and long-term effect on her ability to carry out normal day-to-day activities? I am satisfied that they did. The impact on the Claimant's day-to-day activities was significant. The Respondent criticised the generality of her evidence, but I think the generality of it reflects the all-pervasive nature of the impairments. She had and continues to have trouble sleeping, concentrating, and socialising.

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40. I am satisfied that the effect of the impairments was likely to be long-term.

The incident took place in December 2019. By the relevant time, the impact had lasted nearly 2 years.

41. I am therefore satisfied that the Claimant was disabled.

Employment Judge David Hughes

Date: 15 June 2023

Reasons sent to the Parties: 29 June 2023

FOR THE TRIBUNAL OFFICE