



EMPLOYMENT TRIBUNALS

Claimant: Mr A Durbridge
Respondent: Apple (UK) Limited
Heard at: Watford Employment Tribunal (in public; in person)
On: 20 April 2023
Before: Employment Judge Quill (Sitting Alone)

Appearances

For the Claimant: In Person
For the respondent: Ms T Barsam, counsel

Judgment and reasons were given orally on 20 April 2023. Written reasons were requested, and these are they.

REASONS

1. This has been an in-person hearing conducted in the Employment Tribunal. There was one witness in the case and that was the claimant. I had the most updated version of the Claimant's witness statement, which was 22 pages, and had been sent to the tribunal by way of an email of 20 April 2023.
2. I also had a bundle of documents of in total 175 pages. The claimant gave evidence and was cross examined by the respondent and answered my questions.
3. The hearing today was to decide disability as a preliminary issue as had been listed at a telephone hearing (coincidentally also before me) last November.

The law

4. The relevant law in the Equality Act 2010 ("EQA"), section 6 defines disability and includes that :

"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."

5. The section also refers to the need to take into account Schedule 1. The

paragraphs in that schedule include the following extracts in Part 1.

“2 Long-term effects

- (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.
- (3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.
- (4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

5 Effect of medical treatment

- (1) 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.

6. Part 2 of Schedule 1 refers to the need to take the guidance into account.
7. In terms of whether or not an effect is likely to recur, in SCA Packaging Limited v Boyle [2009] UKHL 37; [2009] ICR 1056, the House of Lords made clear that in that context “likely” means something that could well occur as opposed to something that is more likely than not to recur.
8. As per paragraph 5 of schedule 1, it is important to effectively ignore any beneficial effects of medical treatment and to ascertain the effects on day-to-day activities as it would otherwise be but for that medical treatment.
9. As noted in the guidance, an impairment might not have a substantial adverse effect on a person’s ability to undertake a particular day to day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, would result in a substantial adverse effect.
10. Guidance:

Effects of behaviour

- B7. Account should be taken of how far a person can **reasonably** be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In

some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities.

For example, a person who needs to avoid certain substances because of allergies may find the day-to-day activity of eating substantially affected. Account should be taken of the degree to which a person can reasonably be expected to behave in such a way that the impairment ceases to have a substantial adverse effect on his or her ability to carry out normal day-to-day activities. (See also paragraph B12.)

When considering modification of behaviour, it would be reasonable to expect a person who has chronic back pain to avoid extreme activities such as skiing. It would not be reasonable to expect the person to give up, or modify, more normal activities that might exacerbate the symptoms; such as shopping or using public transport.

- B8. Similarly, it would be reasonable to expect a person with a phobia to avoid extreme activities or situations that would aggravate their condition. It would not be reasonable to expect him or her to give up, or modify, normal activities that might exacerbate the symptoms.

A person with acrophobia (extreme fear of heights which can induce panic attacks) might reasonably be expected to avoid the top of extremely high buildings, such as the Eiffel Tower, but not to avoid all multi-storey buildings.

- B9. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment, or avoids doing things because of a loss of energy and motivation. It would **not** be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person. In determining a question as to whether a person meets the definition of disability **it is important to consider the things that a person cannot do, or can only do with difficulty.**

In order to manage her mental health condition, a woman who experiences panic attacks finds that she can manage daily tasks, such as going to work, if she can avoid the stress of travelling in the rush hour. In determining whether she meets the definition of disability, consideration should be given to the extent to which it is reasonable to expect her to place such restrictions on her working and personal life.

- B10. In some cases, people have coping or avoidance strategies which cease to work in certain circumstances (for example, where someone who has dyslexia is placed under stress). If it is possible that a person's ability to manage the effects of an impairment will break down so that effects will sometimes still occur, this possibility must be taken into account when assessing the effects of the impairment.
- C5. **The Act states** that, if an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur. (In deciding whether a person has had a disability in the past, the question is whether a substantial adverse effect has in fact recurred.) Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of 'long-term' (Sch1, Para 2(2), see also paragraphs C3 to C4 (meaning of likely).)

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.

D5. A normal day-to-day activity is not necessarily one that is carried out by a majority of people. For example, it is possible that some activities might be carried out only, or more predominantly, by people of a particular gender, such as breast-feeding or applying make-up, and cannot therefore be said to be normal for most people. They would nevertheless be considered to be normal day-to-day activities”.

11. The point in time which the question of disability is to be determined is the date of the alleged discriminatory act or omission. That therefore is the date from which it has to be judged whether or not an impairment was likely to recur.
12. In Sullivan v Bury Street Capital Limited Neutral Citation Number: [2021] EWCA Civ 1694, the Court of Appeal approved the following list as setting out the questions that a tribunal will be required to address when determining whether or not a claimant is disabled for the purposes of the Equality Act.
 - 12.1 Was there an impairment?
 - 12.2 What were its adverse effects?
 - 12.3 Were they more than minor or trivial?
 - 12.4 Was there a real possibility that they would continue for more than 12 months or that they would recur?
13. These are questions that the tribunal has to decide, medical evidence is likely to assist but, ultimately, it is the tribunal’s legal determination which is what counts.
14. In Rayner v Turning Point Appeal No. UKEAT/0397/10, it was held that (although the question of whether there is a substantial adverse effect is a matter of fact for the tribunal to determine), in circumstances where a claimant is diagnosed with anxiety by their GP and the GP advises then to refrain from work then that is in itself evidence of a substantial effect on day-to-day activities because were it not for the anxiety the claimant would have been at work and his day-to-day activities included going to work.
15. I have taken into account the guidance issued in J v DLA Piper UK LLP [2010] IRLR 936. Although decided on pre-Equality Act 2010 legislation, it gives guidance that is still relevant about the need to precisely analyse the effects of any alleged mental impairment and to distinguish between, on the one hand, that people’s moods can change and people can have a low mood and can feel anxious about things because of life events (the type of thing that might affect almost everybody from time to time) and, on the other hand, the effects of an impairment. I do not need to list examples of the type of life events that can upset people and cause a great deal of distress, but the Court made it clear that it is important to note that even if somebody has been distressed on several different occasions, if each occasion was reacting to particular life events, then that might not

demonstrate they had a “physical or mental impairment” or that they necessarily meet all parts of the definition in s.6 of the EQA.

16. As discussed in Sullivan (para 92), the point being made in DLA Piler is that where there are examples of symptoms at different periods, then:
 - 16.1 one possible inference from the facts, if the evidence supports it, is that those separate examples were all due to a continuing impairment, and are examples of the underlying condition being severe (or worse than typical) at those times.
 - 16.2 However, that is not the only possible conclusion from the facts. Another possibility is that they were separate reactions to separate life events.

Claimant’s Evidence and Medical Evidence

17. In this case, in the claimant’s witness statement, he has described the specific alleged effects on him at paragraph 1 through to 5 of his witness statement. He has described loss of focus, feeling overwhelmed, being what he described as “foggy” and being fatigued. He said that the alleged impairment affects his ability to plan, to read and to focus. He said that his concentration is affected, affecting his ability to read and write emails. It affected, he says, his ability to speak clearly. It affects his ability to sleep and that the sleeplessness in turn causes further impairments. He also alleged at paragraph 5 that he has experienced blurred vision, heart palpitations and chest pains and dermatological flare ups.
18. The claimant’s GP records have been disclosed and they start at page 140 in the bundle. I note that on page 141 there is no past or present reference to anxiety disorder or any other mental health conditions whether on treated by medication or otherwise. The notes do contain reference to two significant medical conditions one a skin condition and the other a cardiac or respiratory issue.
19. At page 69 of the bundle there is a letter to the claimant’s GP from Dr Chan, that refers to having seen the claimant on 3 February and 5 March and then having had a video follow up with the claimant on 19 March. Almost all of the letter is about the skin condition and Dr Chan is a dermatologist. It does say towards the end of the letter that Dr Chan has advised the claimant to speak to his GP about depression and anxiety and made the observation that CBT might be useful. I do not take that to be a diagnosis by Dr Chan given his or her speciality but, nonetheless, it does record discussions between the claimant and Dr Chan which I accept took place.
20. Having considered the comments about the skin condition and the comments about the cardiac or respiratory condition I am not persuaded from the evidence presented that I should find as a fact that either of those conditions was linked to anxiety or mental health.
21. There is also a reference in the claimant’s witness statement to a knee injury. He said that he is not alleging that that was what he said in oral evidence that he is not alleging that that was caused directly by mental health although he stood by the suggestion that, potentially, it was due to weight loss and that the weight loss was caused by mental health. I am not persuaded to find that as a fact that it has

been proved that there was any link between he knee injury and/or anxiety or any other mental health conditions.

22. At page 157 in the bundle, in the GP notes, there is a considerable gap between November 2012 and July 2017. The claimant draws attention to the entry for 21 July. This relates to a reference that was made and my finding is that it was for the claimant and his partner to potentially have psycho-sexual therapy. I do not doubt the claimant when he says that the reason it did not start straight away is because of NHS waiting lists and it could not start until 2019. But what is significant, is that the claimant is recorded as saying that he had thought through or perhaps they jointly thought through whether there was a stress element and had been able to identify a cause. Significantly, the notes do not say that the claimant had described to the GP as having had anxiety in the past.
23. There is a letter in the bundle at page 96 and it is only dated 19 July 2022: It is from the Oxford University Hospitals NHS Foundation Trust and it refers to the period of time that the claimant and his partner attended that clinic in 2018 and 2019. The letter points out that the colleagues who had seen him during that period no longer work for the organisation but from records in the Trust's possession, the Trust stated that in the assessments on 29 August 2018 the claimant had reported having had bouts of depression since his teens and quite high anxiety levels. It is noted that (based on the information that the claimant supplied presumably), he had never taken medication for those things. It goes on to say that in therapy appointments from 14 February 2019 to 26 November 2019, attended by the claimant and his partner, with a clinical psychologist, it had been noted that the claimant was suffering from anxiety. He was "signposted" (is the word used) to appropriate psychological services to get the anxiety treated. At the final session, 26 November 2019, it had been recorded that the claimant had mentioned that he was seeing a private counsellor.
24. The claimant had provided an email from Marianne Jospe which refers to her recollection of meetings with the claimant from September 2019 onwards. She mentions that she had destroyed her notes for data protection reasons but her email referred to the sessions from September 2019 to July 2020. The bulk of the sessions had been between September 2019 and January 2020 with three further sessions in July. Ms Jospe refers to the claimant having suffered considerably with anxiety and related depressed mood. She mentions that, in particular, she recalls that in many sessions the claimant had been very agitated.
25. The claimant has provided notes and, the claimant is not sure necessarily which sessions each of the notes relate to, However, page 74 refers to 26 November 2020 and says it was Session Number 15. Earlier sessions are in the bundle, some with dates. In this session 15, there is reference to the fact that there had been a suggestion that the claimant visit his GP to discuss his depression and anxiety. It goes on to say that "This was also discussed through out work although the client has recognised he feels more anxious now due to a work situation". The notes said that the Claimant was going to make an appointment for his GP. There was a discussion about further counselling after this 15th and final session but no specific outcomes referred to as far as that is concerned.
26. Lydia Khalil has produced a document which is included in the bundle. Pages 100

and 101 are fairly brief in detail but it describes her observations of the claimant between July 2020 and September 2020. According to her observations, this had been a very difficult time for the claimant and under the heading “Professional opinion and conclusions” she stated that the claimant was suffering at this time his motivation was low, he felt unable to engage with life as usual, he was suffering from depression and anxiety. She said she was unable to provide the exact dates of attendance as the notes no longer existed and again for data protection reasons.

27. The claimant discusses in his witness statement that having been referred for the couples therapy in 2017 and then having a delay of 18 months before the sessions could start in July 2019. As per paragraph 38 of his witness statement the claimant had become aware of specific circumstances in relation to his relationship. These affected him between July and October. [When I say they affected him between July and October. I not suggesting that they necessarily ended in October just that in paragraphs 38 to 42 the claimant is particularly referring to that period]. In particular at paragraph 41, he says that he did not eat or sleep for roughly two weeks. At times he could not remember who he was, he paced his flat crying and gasping. Insomnia caused him to spend his time walking around outside sobbing and talking to himself. He believes he was in a dissociated state and he believes that his symptoms were so bad that two of his friends intervened and took him to stay with them. He refers to that potentially as being connected to his decisions to contact Ms Jospe an also Dr Natasha Langan, Senior Clinical Psychologist.
28. From then until around October or December 2021 the claimant sought to continue his relationship with his partner and that is the background for at least some of the sessions referred to by Ms Khalil and others.
29. The Respondent referred the claimant to Axa Health and a report dated 18 May 2021 is in the bundle [Bundle 77]. At page 78, it is reported that the claimant had informed Axa Health that he had been having sessions of counselling and support since 2018. It also suggested that he had had a diagnosis of anxiety and depression around 2018. It said that he had informed Axa Health that his anxiety and depression had been well controlled up to around “10 months ago” (so, until around August 2020 approximately). It also states that the claimant had been feeling increasingly anxious ,but that is linked to being asked to change his current working pattern which was something that occurred around April 2021, so shortly before the Axa appointment in May 2021.
30. The report also says that the claimant had been having difficulty in sleeping over the last six weeks and finding it hard to concentrate. He said he was managing his usual day to day activities.
31. In relation to the effects of treatment, at paragraph 2, towards the bottom of the page, the Axa Health report accurately states that the claimant was having counselling. It says that the claimant was

“...having difficulty in sleeping and concentrating at times and is receiving counselling and support which in my opinion if this is counted could impact on daily activities”.

Analysis and Conclusions

32. Based on the above descriptions of impairments and effects, it is necessary for me to find facts.
33. The claimant has not produced a great deal of contemporaneous evidence in relation to the period prior to July 2020 of exactly what the effects of his conditions were on him at any specific point in time, or over any specific period of time.
34. He has described the effects in his witness statement. I do accept that the claimant has demonstrated that he did have, prior to July 2020, difficulties with focussing and with feeling dissociated and finding it difficult to concentrate.
35. The professionals that he saw made comments which are consistent with the description that the Claimant has given. The comments are from their recollections in some cases, and from checking their notes in other cases. They were able to say that the claimant had described to them feelings of anxiety and depression.
36. It would have been an easier decision for me today, and perhaps easier decision for the respondent, when asked to consider whether or not it wished to concede disability if there had been stronger contemporaneous evidence. However, the medical professionals have supplied what they can and have referred to the fact that, in some cases, their notes have been destroyed.
37. I am satisfied that the claimant is not inventing or deliberately exaggerating the symptoms that he has described. I am satisfied that he was not, in April 2021 for example, seeking to pretend that he met the definition of disability when he did not.
38. I am satisfied that the claimant genuinely believes that he had suffered from anxiety and depression. The main questions for me are whether or not I should find that it does relate to an impairment (as opposed to being reactions to different life events) and, also, whether, by the relevant date, it had already become long-term.
39. The fact that there can be a link in time between particular life events and particularly strong bouts of anxiety or depression is not unusual. The DLA Piper case is not suggesting that the fact that somebody suffers depression/anxiety following a life event means the depression/anxiety cannot be a disability; it just highlights that the timing raises the possibility of another explanation for the bout of depression, other than an underlying impairment.
40. I am satisfied on the evidence, including the comments from the medical professionals in the bundle, that the claimant does have an underlying impairment of anxiety.
41. I am also satisfied by the evidence - especially taking account of the fact that the sessions with Ms Jospe started in 2019 and then continued - that it had become apparent prior to July 2020 that the effects were likely to last for more than 12 months.

42. For those reasons, I am satisfied that the claimant meets the definition and that he does so from prior to July 2020.

Employment Judge Quill

Dated: 07 July 2023

Sent to the parties on:
11 July 2023

For the Tribunal: