



EMPLOYMENT TRIBUNALS

Claimant: Mr K Oboh

Respondent: West London NHS Trust

2204777/22

Representation:

Claimant: In person

Respondent: Mr C Kelly (Counsel)

Heard on: 7 July 2023, London Central Employment Tribunal by CVP video platform.

Employment Judge: Mr D A Pearl

JUDGMENT

The tribunal makes the following Judgment:

1 The Claimant was not at material times disabled within the meaning of the Equality Act 2010.

REASONS

1 This was the open preliminary hearing to determine “whether the Claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 by reason of generalised anxiety disorder.” He was employed for nearly 10 years as a Senior Nurse Practitioner and the employment ended by resignation in July 2022. The Claimant has a claim for constructive unfair dismissal. The issue for me is whether he can sustain additional claims for disability discrimination.

2 The Claimant’s two-page particulars in the ET1 set out a cogent account of the dispute with his employer concerning the requirement to wear a mask at work. There is no reference at all to disability and no explanation as to why he considers himself to be disabled. This only came in the further particulars.

Paragraph 4 refers to “symptoms of anxiety caused by a generalised anxiety disorder.”

3 A fuller account is to be found in the impact statement supplemented by the later witness statement. This latter refers to the generalised anxiety disorder starting in 2010; and is said to be linked to trauma while growing up in West Africa. The Claimant is currently aged 38. He states that as a mental health practitioner he was able to self-diagnose his condition in 2015. He has managed it successfully since then by ‘self-help’ and other interventions, including homeopathy. He has not been prescribed (or sought, it appears) medication, other than on one occasion, when the period concerned appears to be brief. A GP letter of 19 December 2022 refers to the Claimant having contacted the practice about “stress and anxiety at work” and “stress at work”. As far as can be ascertained from this letter of three sentences, this was in December 2021 and April 2022. He was referred to Talking Therapies at primary care level.

4 The OH reports are about the requirement to wear a mask. The first, of **February 2021**, suggests that the Equality Act does not apply. There is a reference to the Claimant's “underlying health condition”. This is as he has reported to OH and there is no further detail. The Respondent then reported back to OH that the Claimant maintained that wearing a mask exacerbated the “underlying anxiety state”; and OH reported again in **August 2021**. This mainly dealt with possible mitigation measures. There are two references to stress caused by the high workload, indeed the recommendation suggested “you may need to carry out a “stress risk assessment” for this reason.

5 There was a third OH report of **March 2022**. This reported that the Claimant complained of shortness of breath and a cough when wearing a mask. It also stated there was no underlying health condition. As with the earlier reports, the possibility of being disabled under the Act was discounted.

6 Thus far, in the seven documents I have referred to (claim form; further particulars; GP letter; 3 OH reports; impact statement) there is very little detail to support the disability claim. In the final document, the witness statement prepared specifically for this hearing, the Claimant descends to further particulars, some material parts of which I can summarise. He says that after 2015 he used various techniques, including talking therapy (“the primary intervention”, he said), homeopathy and relaxation, to help manage his symptoms of anxiety. He says that there was a relapse in 2018 when he was temporarily in a confused and distressed state for 4 days. It seems that he had a short-term prescription from the GP at that point, but this is an isolated reference and, with no further detail, it does not appear relevant. Then, there was a further relapse in 2020, with panic attacks. These tended to happen at work. They became more frequent, but this and the associated symptoms and treatment (talking therapy) appear to have followed the mask mandate dispute with the Respondent. There was a further relapse, with some time off work, in 2022.

7 In evidence, the Claimant was asked about sickness absence records. He agreed that there were 19 days in 2022; 12 days in 2021; possibly nothing in 2020; nothing significant in 2019; and said there were up to 4 days’ off sick in 2018, although this might have been taken as annual leave in the records, as no sick leave is recorded..

8 He was taken to a supervision note of December 2020 (page 93) that in the first sentence stated that Claimant said he was in good health; and that there were no issues that impacted, directly or indirectly, on his work or on performance. It was pointed out by counsel that in these detailed supervision notes over a number of years, there was no reference to panic attacks at work. The Claimant responded that these supervision meetings were not the place to raise them. He also told me that after 2020, all the panic attacks were related to masks. He also said he had, before then, had panic attacks at work and previous managers had witnessed this. A little further on in cross examination, he conceded that there might have been 1 panic attack at work before 2020.

9 He further stated that, until the mask issue arose, his symptoms were well managed. Attacks were “less frequent” and “would more likely have happened outside work.”

10 He accepted he could rely on no medical diagnosis; and asked me to accept his own diagnosis. He further accepted that he was not trained to diagnose mental health conditions.

11 He also satisfied me that he uses the net in order to access relaxation techniques, mindfulness therapy and the like. It is evident that the Claimant has been assiduous in managing stress in his own way

Conclusions

11 The Claimant must establish that at relevant times he had a physical or mental impairment; and that the impairment had a substantial and long-term effect on his ability to carry out normal day-to-day activities. (Section 6.) This is further defined in schedule 1, para 2, and the effect is long-term if “it has lasted for at least 12 months”; or “is likely to last for at least 12 months.”

12 Herry v Dudley [2016] UKEAT/0100/16 cited the well known passage from J v DLA Piper dealing with stress, anxiety and a ‘reaction to adverse circumstances.’ HHJ Richardson in Herry noted that there are cases where a reaction to life events perceived as adverse can become entrenched; “where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities.” Tribunals are not bound to find a mental impairment in such a case.

13 A preliminary observation should be made. It is to the Claimant’s credit that he has sought to manage his symptoms of anxiety by using techniques he describes as ‘self-help’. He is aware of his vulnerabilities and has acted in a responsible manner throughout. He makes use of therapies that are found on the net. These can be described as coping strategies. When his anxiety has become acute, he has benefited from talking therapy.

14 The Claimant must show: (1) that he has an impairment that is either physical or mental; (2) that the impairment has adverse effects that are substantial (ie, more than trivial); (3) that those substantial adverse effects are long-term; (4) and that they are effects on his ability to carry out normal day-to-day activities. To a greater or lesser extent, the Respondent submits that he fails to establish these essential elements.

15 The sole description of the impairment, or diagnosis, comes from the Claimant. No physician or OH practitioner has made a diagnosis. The Claimant's case is that he has had the impairment of Generalised Anxiety Disorder since 2010. He does not say that it is something that comes and goes. He terms it, in formal terms, a disorder; and medication is not used to suppress the anxiety. For much of the period, I infer from his evidence that he does not experience anxiety. He refers to triggers and says in his statements that when these triggers occur, he uses techniques that include mindfulness and relaxation to avoid a more severe 'relapse'. The evidence suggests that these triggers have in the past 3 years arisen at work.

16 The chronology he gives lacks precision, but there is no evidence for the period 2015, when he made his diagnosis, to 2018, when there was a relapse. I do not consider that he has established that the impairment existed during that period. But, if it did, there is nothing to show that it had an effect on the ability to carry out normal day-to-day activities. If it had the potential to have such an effect, it was clearly managed by the coping techniques. It was reasonable that he should adopt these. B7 to B10 of the Guidance is of relevance. I cannot see from the witness statement that the coping strategies during this period broke down. They seem to have been sufficient. The talking therapies during this period, 2015 to 2018, which the Claimant refers to, do not assist. If there were episodes in his past that led to anxiety, distress or disquiet, it would be reasonable to seek out such therapy. It does not show that the Claimant had a mental impairment that had substantial adverse effects, in the terms demanded by the Act.

17 In 2018 there was the 4 day episode and the Claimant may or may not have taken a short time off work. There is then another gap, 2018 to 2020, during which there seems to have been no time off work. The supervision note of December 2020 suggests nothing untoward. Only in December 2021 did the Claimant see his GP. At this point, the mask dispute was under way. I am not able to find that there was a mental impairment at this point in the chronology. The three OH reports tell against such a conclusion and by March 2022 OH was able to link the wearing of masks to a physical problem, causing coughing.

18 Criticism is made of the Claimant for not providing information he was ordered to disclose. I am in no position to hold that he has breached any order, but I can note the absence of anything else from a GP (eg notes) or any therapist who assisted the Claimant (eg a report). It is something that feeds into my overall conclusion that the evidence for disability is insufficient for the Claimant's purposes.

19 As noted above, the evidence for a mental impairment is imprecise and unclear; and it is dependent on a diagnosis from the Claimant himself. I consider it insufficient. However, there are further difficulties in the chronology and I am unable to say that any impairment lasted 12 months or was likely to: schedule 1 paragraph 2. The Claimant cannot rely on paragraph 5 of that schedule, the 'deduced effects' provision. This is because a variety of measures were taken, including relaxation therapy over the internet, and it is not possible to say that, but for those measures, there would have been the required effect on the ability to carry out day-to-day activities. The measures were various, taken at different times and their effect uncertain.

20 In summary, the Claimant's case is necessarily that for a period of 13 years he has been disabled with a generalised anxiety state that has had an effect on his ability to carry out normal day-to-day activities. More coherent evidence would be required for this to be established. I conclude that there is an overall insufficiency of such evidence and that the Claimant fails to establish that he was disabled within the meaning of the Act.

Employment Judge Pearl

Date: 02/08/2023

JUDGMENT & RESERVED REASONS
SENT TO THE PARTIES ON

02/08/2023

FOR THE TRIBUNAL OFFICE