EMPLOYMENT TRIBUNALS

Claimant: **Mr L Nicholas**

Respondents: **Shopify UK Limited**

Heard at: **East London Hearing Centre (in public, by video)**

On: **18 July 2023**

Before: **Employment Judge S Moor**

Representation

Claimant: In person
Respondent: Mr T Wilkinson, counsel

JUDGMENT

The Claimant was a disabled person at the material time (July 2022).

REASONS

1. The claimant was employed as Lead, Diversity and Belonging, EMEA by the Respondent, a global ecommerce business.

2. He presented a disability discrimination complaint to the Tribunal on 25 October 2022 after a period of ACAS Early Conciliation from 30 September 2022 to 25 October 2022.

3. This hearing was held to decide whether the Claimant was a disabled person at the material time. All agreed at the outset that the material time here was in July 2022 when the acts/failures alleged to be discrimination took place.

Findings of Fact

4. Having heard the evidence of the Claimant and read the documents referred to me, I made the following findings of fact. I have applied the test 'what is more likely to have occurred'.

5. Mr Nicholas experienced a mental health crisis in February 2022 when he had thoughts of taking his own life, numbness, began to have low moods and a sense of detachment that led him to seek psychotherapy not via his GP but through self-help. In his evidence he said he had experienced or been aware of those symptoms before.

6. Prior to February 2022 he had not consulted a doctor about mental ill health. When he first consulted his GP in April 2022 her note record he told her that he had *'never had similar episodes in the past, no mental health concerns before, always been very resilient'*. At that stage he described numbness, with waves of sadness and a feeling of isolation. The positive things in his life were not making him happy. He had a low energy, low motivation and little appetite. He could go for 12 hours without eating. I find he had not had loss of appetite before February 2022 – this would have manifested itself in a loss of weight over the years. The GP in April 2022 diagnosed him as 'objectively depressed'. He had good insight. While he had thought his life was in his hands he had, by then, he had no intention or plan to take his own life and the medical notes show these thoughts did not return.

7. It is likely that the Claimant's current mental ill health has its root in childhood experience, but that is not the same thing as saying he has always had depression or that it has had, since childhood, a substantial adverse effect on day to day activities. While he said in his letter of 27 April 2023 (to the Tribunal and Respondent) that he had had depression since childhood, he had not had low moods, numbness, thoughts of taking his own life, a sense of isolation or low motivation before. He referred to coping mechanisms to deal with depression until the February 2022 crisis. The coping mechanisms he described in his oral evidence were 'denial and avoidance' he explained 'not really facing up to what was going on, just soldiering on'. He said if he were tired would be tired but not recognise that as depression. The only evidence I have pre February 2022 is tiredness but from the little evidence I have it does not appear to have been as extensive as the post-Feb 2022 fatigue. Prior to February 2022, the Claimant said he would feel obliged to go to organised fun like rugby socials although they were 'energy sapping'. Prior to February 2022, I find the Claimant did do housework and cooking as he has described that within his relationship, he was the one to do those things and described a change after February 2022 when he struggled to do them at all.

8. The Claimant was prescribed an anti-depressant Sertraline at 50mg in April 2022. The plan was initially to continue this for 6-9 months (i.e. up to December/January 2023). The GP discussed there may be a need to stay on medication even after a relief of symptoms and the need for a period of weaning off.

9. The Claimant has not been absent from work because of depression. But during his employment with the Respondent from March to July 2022 the impact of fatigue on his concentration was such that he took informal breaks (he was working from home).

10. In the period after February 2022 the claimant had sleeping problems – first sleeping too much and not being refreshed that led to fatigue and had an impact on concentration, especially with being able to read. While the GP does not note this in terms, I accept his evidence about it.

11. From April 2022 the GP reports show that the Claimant's low mood had improved. In June the GP notes the Claimant's mood had been 'a lot better'. I find the timing is such that this is likely have been the result of medication.

12. The GP notes in May and June record a continuation of sleep problems: now insomnia and night sweats which may well have related to the medication and also might also have been exacerbated by a cold the Claimant had picked up on the way back from a work trip to San Francisco.

13. I find it likely that in the period post February 2022 the Claimant also actively avoided social activities outside work, that he had felt obliged to go to in the past because of his mental ill health.

14. The Claimant acknowledged in his evidence that the symptoms he described in his letter of 27 April 2023 describe his symptoms and their effects at that date and not at the material time. I have not been able therefore to give this letter weight.

15. While the Claimant claims to have had a diagnosis of 'severe depression' this is not established by the GP notes. The diagnosis is of a depressive disorder.

16. I have ignored the evidence of later disability support which may well have derived from later experience of symptoms. This is because I have ask the disability question as of July 2022.

Legal Principles

17. Mr Wilkinson has well set out the law in his skeleton submission to which I refer below with less elegance.

18. Under section 6 of the EqA 2010 someone is disabled if they have a mental impairment that had a substantial and long-term adverse effect on their ability to carry out normal day to day activities.

19. Substantial means 'more than minor or trivial'.

20. Long term means lasting 12 months or is likely to last 12 months. I consider not whether the impairment has lasted this long but whether the adverse effects have done so. The guidance paragraph C3 gives help on the meaning of 'likely to' in this context: something is likely to happen if it 'could well happen'. The House of Lords Case of Boyle v SCA Packaging Ltd [2009] ICR 1056 HL. Lady Hayle emphasised in her speech that the 'more likely than not' approach or the 50%+ chance test is incorrect. 'Likely' here simply meant something that is 'a real possibility', in the sense that it 'could well happen', rather than something that is probable or 'more likely than not'. It seems to me this distinction could be very important in this case.

21. I must consider the question at the time of the alleged discrimination. I should not look at events occurring after July 2022 in deciding whether any adverse effects were likely to be long term.

22. When looking at adverse effects I consider them in the absence of any medication or other measures taken to deal with them. This is called deduced effects. I should concentrate on what the claimant could not do or struggled to do.

23. I have considered the Guidance on the Definition of Disability at paragraphs B7-10. Where a person has coping mechanisms or avoidance strategies to deal with the adverse effects of an impairment I should take into account:

23.1. Whether the person can reasonably be expected to adopt them;

23.2. How far they reduced the substance of the effect (including whether they are likely always to apply).

Application of Facts and Law to Issue

24. This has been a difficult case to decide. Mr Nicholas is clearly someone who has had a mental health crisis in February 2022 and is undertaking therapy to understand and cope with his ongoing mental ill health. He has shown real insight and openness in doing so. However, the question for me is whether he was disabled as at a certain point in time - July 2022 – when the evidence as to his condition is less clear cut. I must be guided by the evidence and legal principles and not be swayed by my natural sympathies.

25. First, I agree with Mr Wilkinson that there is insufficient evidence here for me to decide that the Claimant experienced substantial adverse effects of any mental impairment prior to his crisis in February 2022.

25.1. On the Claimant's own account, prior to then he had no self-harm thoughts, no low mood episodes, and no feeling of numbness.

25.2. The Claimant explains his description of not having mental ill health to his GP as having limited understanding of depression and not recognising his fatigue for what it was. But the evidence of his fatigue does not suggest that the effects of it were more than minor: there is no evidence he visited his GP about it; there is no evidence of an impact on activities like housekeeping and cooking; the Claimant had not recognised it as an ongoing problem with a mental ill health cause. His description of social events being energy sapping is in my judgement within a normal spectrum of responses to social events. The Claimant did not avoid going to them or reduce the number of events he went to.

25.3. I also take into account that the Claimant told his GP in April 2022 that in the past he had been 'resilient' this again suggests there had been no substantial adverse effect on his daily life activities.

25.4. I take into account he had not sought help of any kind medical or otherwise pre February 2022.

Thus, there is insufficient evidence of substantial adverse effects of depression on the Claimant prior to February 2022. This is not to deny the Claimant's

understanding that the cause of his current depressive symptoms was rooted in childhood.

26. Second, I do find the depression led to adverse effects on the ability to carry out day to day activities between February to July 2022. The following symptoms

26.1. sleep problems leading to fatigue,

26.2. fluctuating low moods;

26.3. low motivation; and

26.4. low energy.

27. The fatigue he described – getting up and not feeling refreshed - is likely to have had a more than minor impact on many day-to-day activities that require concentration, reading being one. Low motivation and energy adversely affected his ability to do the housekeeping and cooking - matters he was responsible for. He did them far less: that is not a minor impact. The impact on his concentration was such that he took informal breaks at work to deal with it. He began actively to avoid social activities is more, again that is a more than minor impact on day to day activities – beyond normal range I described above.

28. I find it likely in this early stage, post-crisis, in the absence of therapy and/or medication these adverse effects are likely to have been worse. This is because upon receiving therapy and medication there was some improvement (especially to mood and stopping suicidal thoughts) which, doing the best I can, is likely to have been the result of them given the coincidence in timing.

29. I have taken into account that the Claimant managed to stay at work and had no absences. The medication and therapy will have helped him to do so by reducing the adverse effects, but he did struggle with concentration at work.

30. In deciding whether the deduced adverse effects were more than minor I have aggregated them and find they do reach the threshold of more than minor. While it is always a judgment call there were enough impacts on the Claimant's life that even if they were individually relatively minor, taken together they had a more substantial adverse effect upon him.

31. The question in this case therefore boils down to whether, as at July 2022, those substantial adverse effects were likely to last more than 12 months (i.e. to the end of January 2023 or early February 2023).

32. Mr Nicholas asks me to consider that he had severe depression and asserts that depression is usually long term. There is no evidence that his depression was regarded as 'severe'. In fact, it seemed to be responding well to medication and therapy. Nor is there any evidence that depression is usually long term. Depressive episodes vary and I cannot decide this case on that assertion. In any event it is the adverse effects of any impairment on each individual that the law requires me to consider not the diagnosis or label itself.

33. Whether something is likely to last for 12 months means 'it could well happen'. The test is not one of 'probability' i.e. there being more than a 50% chance. It is more of real possibility – it could well happen.

34. The factors that point to the finding that as at July it could be said that the substantial adverse effects could well continue for at least 12 months from February 2022 are as follows;

34.1. The initial mental health crisis was acute at first with some significant effects for which medication was necessary and ongoing therapy was appropriate.

34.2. About 5 months had already elapsed during which there remained a more than minor (deduced) adverse effect on day to day activities.

34.3. The initial plan was to continue medication up to December 2023, albeit with some recognition that medication could continue to be prescribed beyond the recovery of symptoms to avoid relapse. To me this plan suggests that the GP thought in April 2022 the symptoms (and therefore adverse effects) could well last until December 2022/January 2023 even if there was a chance of recovery before then.

35. The factors that point in the opposite direction are as follows:

35.1. The most significant factor is the Claimant's prior mental resilience and newly gained insight. These, in my judgment, would both give him a good chance of recovery, but how soon is much more difficult to say.

35.2. Second, he had managed to stay at work throughout – again showing resilience.

35.3. There is a tone in the GP notes of improvement in May and June, and there was plainly a reduction of the most severe symptoms (thoughts of self-harm and low mood) but I have found this more likely to be 'deduced effects' coinciding as they did with the impact of therapy and medication. I adopt, therefore a more cautious approach to what this tone tells me about the chance of the adverse effects lasting at least 12 months in the absence of medication/therapy. At best these improvements were the cause for some optimism in the overall prognosis rather than a clear indication of early recovery.

36. This has been a difficult decision. It seems to me, however, applying the proper meaning of 'likely' as 'could well happen', then in my judgment as at July 2022 it could well happen that the substantial adverse effects (absent medication or therapy) could last at least 12 months from February 2022. The Claimant had experienced a significant mental health crisis that he was working through with help. He had not recovered quickly. He still had adverse effects from at after 5 months. The medication plan anticipated that it might well be he needed medication through to December 2022/January 2023. He was gaining insight and understanding as to how childhood events affected him but, as at July 2022, it could well be the case that this was going to take another 7 months. In

other words, the factors I have set out above in favour of that conclusion seem to me to outweigh the factors against. As at July 2022 I would have answered 'Yes' to the question could it well be the case (it was a real possibility) that the Claimant would continue to experience more than minor adverse effects on his ability to do day to day activities beyond January 2023.

37. Thus, the Claimant was a disabled person within the meaning of the Equality Act in July 2022.

Employment Judge S Moor
Date: 18 July 2023