



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms K Nicholson

**Respondent:** Jet 2 Holidays Ltd

**HELD in Hull** ON: 27 July 2023

**BEFORE:** Employment Judge Miller

## REPRESENTATION:

**Claimant:** Ms A Duggan (friend)

**Respondent:** Mr A Francis (counsel)

**JUDGMENT** having been sent to the parties on 31 July 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. The question I have to decide is whether Ms Nicholson was at the time this claim is about disabled by reason of anxiety and depression within the meaning of section 6 of the Equality Act 2010. I set out my relevant findings of fact and explain the law briefly and then set out my conclusions.
2. The relevant chronology is as follows. The claimant has worked for the respondent since 2007. She is still employed by them but has been off work sick since October 2021. Although it was only touched on briefly it is relevant to know that at some point before January 2020 the claimant had had a hysterectomy and was experiencing symptoms of the menopause. She was then at that time prescribed Fluoxetine 20mg for those symptoms from at least January 2020.

3. As everyone knows from early 2020 the global Covid-19 pandemic started to have an impact in the UK. Sadly the claimant's sister contracted Covid and passed away in November 2020. This had a very significant impact on the claimant and she was signed off sick for this. Her fit note at that time recorded recent bereavement as the reason for her absence and she was off until she returned to work in January 2021.
4. At this time the claimant was required to work in a predominantly administrative role. Her usual job was dealing with customer complaints on the telephone. From then until June 2021 the claimant had a period of undertaking non-telephone admin work and some periods of furlough.
5. The claimant says that at this time she was grieving for her sister and she had an additional obligation in that she had to take over caring for her elderly parents, but the claimant says that she was getting on with things. Although it was a very difficult time for her she was coping as one might expect.
6. In June 2021 Covid restrictions were eased and the respondent went back to operating flights. At this point the claimant returned to her job of answering customer queries and complaints on the telephone. There is no doubt that the claimant found returning to this role very difficult. Many of the calls were about Covid related issues either very serious ones which reminded the claimant about the loss of her sister or minor inconveniences which I understand made the claimant angry that people could trivialise such a significant thing.
7. At that time as far as the claimant could see people also seemed to be flouting guidance about Covid which was either the cause of their own problems or the claimant found understandably to be upsetting.
8. The claimant managed to stay at work for a few weeks but went to her GP on 16 July 2021 and asked for a fit note. In evidence the claimant said that the reason she went to her GP was that she was experiencing sweating, palpitations, crying, she couldn't focus or concentrate and her sleep was erratic. The doctors notes at the time did not record this. They say and I am quoting "has returned to work at Jet2. Patient struggling to cope as she feels customers are insensitive with their attitude to Covid. Patient ?? Med3 which is the fit note. Mood stable. No deliberate self-harm thoughts. Having counselling. On Fluoxetine".
9. In her disability impact statement the claimant describes a number of difficulties that I will come to shortly but is unclear when they started from that statement.
10. The claimant says that her problems started with her bereavement but it is clear from the claimant's evidence today that it is not as simple as that. The claimant was then signed off at that time with stress related problems.
11. In my view, on the balance of probabilities I think it is likely the claimant was experiencing difficulties as she describes today which is the reason she went to her GP in the first place. The claimant's evidence about the impact of the phone calls on her is wholly plausible. It is likely in my view that the claimant was at that time having difficulties sleeping, focusing and concentrating.
12. I acknowledged Mr Francis' submissions that this level of detail is likely to have been recorded in the GP notes. However I bear in mind this was at a time when all GP appointments were by phone. Many people were experiencing problems

arising from Covid and the claimant did present as her problems being focused predominantly on work.

13. It is entirely plausible in my view that this was all wrapped up in the phrase struggling to cope.
14. The claimant then had sick notes until 30 July and returned to work in August 2021. The claimant says that she was expecting to have a phased return but that that did not happen. Very soon the claimant was struggling to cope with calls again and she describes the final straw in October as being having to deal with the customer whose sibling had died of Covid. Unsurprisingly the claimant found this very challenging and she went off sick from 26 October 2021.
15. The doctor's records of 26 October 2021 refer predominantly to the claimant's complaints about work and the difficulty she had hearing customer complaints. They do say however that the claimant was not bothered about money and couldn't bear to go to work and the claimant in that appointment agreed to try counselling.
16. I have been taken through all the relevant doctor's records and I find that the reason for absences from here on in was recorded as stress related problem except on one occasion when the diagnosis changed to work stress in March 2023.
17. The claimant then renewed her sick note on a monthly basis. She did not speak to the doctor on every occasion. On 13 December 2021 the claimant appears to have requested a fit note through the NHS App and appears to indicate that she is hopeful of returning to work in the near future and the notes record that the claimant indicates that a months' fit note would be appropriate at that time. In evidence the claimant also said that at that time she would hope that this would still be a relatively a short term thing.
18. Shortly after that on 20 January 2022 the claimant visited the respondent's occupational health advisor who said that the claimant was not fit to return to work at that time. The findings of the OH advisor then were that the claimant's issue was predominantly about taking the upsetting calls. They say the claimant was leading a healthy lifestyle and sleeping well. They do indicate though that the claimant had been treated for mental health problems for a year by then which I conclude refers back to either the treatment for menopause symptoms or the first period of sickness absence following her bereavement. The occupational health conclusion in that letter is that the problems are likely to be resolved when work place issues are resolved. Specifically they say for many mental health can affect them lifelong but hopefully Ms Nicholson's mental ill health may improve with further counselling and resolve in her current workplace issues.
19. I find by this time the claimant had been experiences symptoms of stress since June 2021 so seven months or so. By this time the claimant had had one period for counselling for three months that was unsuccessful and was on the waiting list for further counselling and was continuing to be prescribed Fluoxetine.
20. The claimant had a consultation with her GP then in March 2022. It records and I quote "can't bear to go to work, can't bear to talk to people over the telephone. Feel mismanaged at work and her sister died a year ago and she feels she is re-living her loss so often when she speaks to people." Then in a

further consultation in August 2022 the claimant again referred to workplace issues and an impending HR meeting.

21. In October 2023 the claimant had a further occupational health consultation. In this consultation the claimant described panic attacks arising from telephone calls at work and making her feel physically unwell. By this time the claimant had been absent for a year or so, so had not had to undertake those calls at that time.
22. Occupational health gives no useful insight into how long the condition is likely to last for the claimant at that time and indicate that the claimant is not fit to return to her usual role.
23. In January 2023 the claimant had a consultation with yet another GP. This was a long consultation for half an hour and the notes record that the Employment Tribunal process is ongoing and the claimant wants to pursue her employers through the courts. The claimant brought panic attacks and crying in this consultation with her GP. The GP describes the claimant as chatty and recommends that she make time for herself. It appears that the GP may also be recommending a self-referral to a support organisation but this is not obvious.
24. The final evidence of GP evidence is a letter of 4 May 2023 stating that the claimant remains at that time tearful, anxious and was continuing to struggle with poor concentration.
25. This is now a chronology of the claimant's interactions with her GP and occupational health. We now consider briefly the claimant's disability impact statement and what she describes as her symptoms.
26. In her impact statement the claimant describes the following impact on her day to day life. An inability to maintain relationships, difficulty getting out of bed and engaging in the day requiring assistance from her daughter, a lack of interest in social activities like shopping and maintaining her home, not taking care of herself generally. And in oral evidence the claimant also described feelings of not caring about anything and a lack of empathy.
27. These descriptions are not completely consistent with the doctor's notes. I recognise the doctors vary, they do not record everything verbatim and consultations were during Covid on the telephone. However I agree with Mr Frances that generally doctors do pick up on key issues and it seems inherently unlikely that one of the GPs would not have recorded some of the issues about sleeping, socialising or self-care if the claimant mentioned them. On the other hand there is a reference to not caring about money and not being able to face work.
28. In my judgment, while the claimant was undoubtedly experiencing problems with her day to day life and the activities that she describes, I think it is likely they were not as frequent or severe as she now reports and nor were they her primary focus of her contact with her GP. It is abundantly clear that the claimant was and remains troubled by her interactions with customers on the telephone in the context of her bereavement and Covid. The claimant saw the respondent's actions as the cause of her feelings and she therefore, in my view, focus and continues to focus on that. I should say that I am not intending to imply that the claimant has in any way being dishonest at this, I am merely

referring to the impact of memory of how things become more heightened the more you think about them effectively.

29. However, I do find that the claimant did have some difficulties with day to day activities including sleeping and a lack of empathy which may well manifest itself as reduced social interaction. This is evidenced by the claimant's reference to excessive drinking and by the referrals to counselling. It is unlikely in my view that a GP would refer a person for counselling if their mental health is not impacting adversely on their life to some extent.
30. On the balance of probabilities, these problems started when the claimant returned to work in June 2021 or shortly thereafter. Until then she had been managing the normal effects of grieving if there is such a thing. However, rather than things continuing to get gradually easier for the claimant from then, from the point that she was dealing with the phone calls things started to deteriorate for the claimant in terms of day to day activities.

### Relevant law and conclusions

31. The relevant section of the Equality Act is section 6 which says that a person P has a disability if P has a physical or mental impairment and the impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities. Schedule 1 to the Equality Act says: the effects and impairment is long term if it has lasted for at least 12 months and is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected.
32. I refer also to the Code of Practice Appendix 1 of the Equality and Human Commission Code of Practice on Employment and the meaning of disability. That says that the substantial adverse effect is something which is more than minor or trivial in determining whether something has a substantial adverse effect. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment or because of the loss of energy and motivation. The code says that normal day to day activities are those activities which are carried out by most men or women on a fairly regular and frequent basis. Day to day activities include things such as walking, driving, using public transport, cooking, eating, lifting and carrying every day objects, typing, writing, going to the toilet, talking, listening to conversations or music, reading, taking part in normal social action or forming social relationships, nourishing and caring for one self although that is not an exhaustive list.
33. Finally where someone receives treatment should be ignored and the impairment should be taken to have the effect it would have without such treatment.
34. The two key issues in this case are really whether the claimant has an impairment within the meaning of section 6 and the long term condition namely whether it had or was likely to last for more than 12 months. Mr Francis referred predominantly to two cases **J v DLA Piper** and **Herry v Dudley Metropolitan Borough Council**. I am not going to quote extensively from those cases, but really the key issue I think in this case is the distinction to be made between an impairment in the medical sense to use a sort of shorthand way of describing it, and what has been described as a reaction to adverse life events and specifically Mr Francis was talking about the distinction between stress and

clinical depression. Of course I recognise that distinction, but in my view the most helpful passage in the DLA Piper case which is also cited in Herry, is that at the end of the part quoted by Mr Francis which is that if as we recommend at paragraph 42 above the Tribunal starts by considering the adverse effect issues and finds that the claimant's ability to carry out normal day to day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more. It would in most cases be likely to conclude that he or she was indeed suffering clinical depression rather than simply a reaction to adverse circumstances. It is a common sense observation that such reactions are not normally long lived. This enables me to overcome the very difficult distinction between medical and non-medical causes of impact on day to day life. In any event I am not a doctor, I am not in a position to make that diagnosis and is a philosophical distinction that is not often helpful in the real world.

35. In my view, the correct approach for me in this case is to consider what day to day effects there were on the claimant and want to work from there. If the effects were short lived and/or only impacted on work related matters they are unlikely to satisfy the second part of the test in any event.
36. I have found that from June 2021 the claimant was experiencing an impact on her ability to sleep and undertake the same level of self-care as she had previously. At times, in my view, although not as often her memory now leads her to believe, things were worse, she was crying, upset and had panic attacks and she was required to rely on help from her daughter. The impact on day to day life is only required to be more than minor or trivial. In my judgment this part of the test is satisfied. From June the claimant was experiencing a substantial, namely more than minor or trivial adverse impact on her ability to undertake day to day activities.
37. The next question then is was this because of an impairment. In my view it was. Although I am not permitted to what has happened since the time I am looking at to determine the long term question, I can consider in my view all the evidence to consider impairment. For example it would be perverse to ignore a retrospect clinical test result to determine whether someone had had an impairment at the time so the same principle must apply when considering a DLA Piper case.
38. As a matter of fact, the impact has been long term. The impact together with the duration and unsuccessful attempts of treatment have in my view taken this outside the remit of a life event reaction or a strictly work related matter into the realm of impairment within the DLA Piper sense. I therefore find that since June 2021 the claimant has had an impairment of mental ill health, it being in my view unnecessary to attempt to merit any further than that which has had a long term adverse impact on her ability to undertake day to day activities. To this extent the GP's recording of the impairment is of some but limited relevance to the legal test I have to consider.
39. From June 2022 therefore the claimant was disabled because the effects had actually been long term. However I need to consider the point from which that was likely to continue for at least 12 months if earlier. The claimant was hoping that her problems would be short term as of December 2021 and she was still optimistic about returning to work shortly thereafter. In the occupational health report of January 2022 the advisor expressed that the hope that the claimant's mental ill health would improve with counselling and resolve in workplace issues

which in my view also supports my finding that workplace issues were a part of but not the whole of the claimant's difficulties. By the time of this occupational health consultation in January the claimant had been experiencing adverse effects for seven months. As Mr Francis submitted likely means could well happen. Given the previous attempts of treatment and the cautious way in which the occupational health advisor phrased their view of the prospects of recovery, I find that it could well happen that by January 2022 the claimant would continue to experience the adverse effects that she had so far been experiencing, and to that extent it was likely that they would continue by then.

40. For these reasons I find that the claimant was disabled by reason of mental ill health from 20 January 2022.

Employment Judge Miller

Date: 15 August 2023

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