



EMPLOYMENT TRIBUNALS

Claimant: Travis Malkan

Respondent: Surya Hotels Limited

Heard at: CVP

On: 11 September 2023

Before: Employment Judge Freshwater

Representation

Claimant: in person

Respondent: Ms Bradbury (counsel)

DECISION

- 1. The claimant has a disability for the purposes of section 6 of the Equality Act 2010.***
- 2. The claimant has the mental impairment of depression which has a substantial and long-term adverse effect on the claimant's ability to carry out day to day activities.***

REASONS

Background

1. The claimant was employed by the respondent as a chef from 18 September 2020 until 20 September 2022.
2. The claimant issued a claim for disability discrimination and arrears of pay. A preliminary hearing was listed to deal with whether or not the claimant is a disabled person for the purposes of section 6 of the Equality Act 2010.
3. The claimant alleges that the discriminatory acts against him took place starting in July 2021, and carried from that date until he issued his claim form on 8 September 2022.

Procedure and hearing

4. The hearing was held remotely by CVP. I was referred to an electronic bundle of 89 pages.

5. I heard oral evidence from the claimant, and submissions from both parties.
6. I gave oral reasons for my decision at the end of the hearing. The respondent requested written reasons pursuant to Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 on the date of the hearing. A copy of these reasons, and my decision, was sent to both parties.

The law

7. Section 6 of the Equality Act 2010 applies.
8. Section 6(1) says that:

*“(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.”*

9. Schedule 1 of the Equality Act 2010 sets out more detail about the meaning of disability for these purposes. Of relevance to this case is schedule 1, paragraph 2, which says:

*“(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.”*

10. In respect of the effect of medical treatment, schedule 1 says:

*“(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.”*

11. Tribunals are required to look at four questions when determining if a person is disabled under the Equality Act 2010:
 - a. did the claimant have a mental and/or physical impairment? (the ‘impairment condition’)
 - b. did the impairment affect the claimant’s ability to carry out normal day-to-day activities? (the ‘adverse effect condition’)
 - c. was the adverse condition substantial? (the ‘substantial condition’), and
 - d. was the adverse condition long term? (the ‘long-term condition’).

Findings of fact

12. The claimant was first signed off sick from work with stress from 29 September 2021 until 4 October 2021.
13. The claimant first spoke to Wellbeing Services on 22 October 2021. This followed a conversation with his doctor on 12 August 2021 (see page 33 in the bundle). The appointment was booked on 31 August 2021 (see page 64 in the bundle). It was agreed that Cognitive Behavioral Therapy [CBT] and Eye Movement Desensitization Reprocessing Therapy [EMDR] might be useful and the claimant's case was referred to a supervisor for consideration. The claimant was scored for depression and anxiety.
14. On 27 October 2021, the claimant was sent a letter by Wellbeing Services to say that a telephone appointment had been booked with a psychological therapist on 16 November 2021. Attached to that letter was a document entitled "PTSD ADMS". (See pages 56 and 57 in the bundle.)
15. On 16 November 2021 the claimant had an appointment with the psychological therapist, and it was agreed that the claimant would be put on the waiting list for treatment for trauma-related therapy. The wait was likely to be five months. Once again, the claimant was scored for depression and anxiety. (See page 69 in the bundle.)
16. The claimant had an Occupational Health assessment on 3 March 2022.
17. The claimant was first diagnosed with depression on 9 March 2022.

Conclusions

18. There is no medical evidence of a diagnosis of complex Post Traumatic Stress Disorder [PTSD]. I accept that the claimant believes he has complex PTSD, and that this was raised with him in a conversation with the wellbeing adviser. It is seen in the bundle that the adviser considered that the claimant ought to be considered for EMDR and CBT. Markers of depression and anxiety were noted. This, in my view, is consistent with a detailed talk about the claimant's mental health. I do not think that there was an attempt to provide a diagnosis by that adviser. Generally speaking, medical standards require that PTSD must be diagnosed by a psychiatrist. The claimant accepts that he has not spoken to a psychiatrist. However, I find it credible that the possibility of PTSD could be raised by someone other than a psychiatrist. I also find it likely that the claimant has said he has PTSD and that this was transposed into his medial notes and the Occupational Health reports without, it appears, anyone seeking more detail about whether or not he actually had a formal diagnosis. This is not the fault of the claimant and I do not believe he was trying to mislead anyone. I believe he was simply reporting what he thought to be true, even if he was mistaken in that belief. I therefore do not find that the claimant had the mental impairment of complex PTSD on the basis there is no medical evidence before me to support such a diagnosis.
19. The claimant has been diagnosed with depression. This happened in March 2022 and is not in dispute. However, the claimant has given evidence himself about his impairment before then. There is also evidence that he sought help with his mental condition from Wellbeing Services. The fact that he was referred for trauma-based therapy and there was a waiting list of five months is indicative of the fact that this impairment was likely to be ongoing.

20. The claimant was signed off sick from work with stress in September 2022. This is evidence that he was not able to cope at work due to his mental condition.
21. I find that the claimant had a mental impairment from when he was signed off from work sick on 29 September 2021. His impairment had an adverse effect on his ability to carry out day-to-day activities, because he was unable to work. He was also unable to sleep and worried constantly. This is consistent with his stress amounting to a disability. Stress by itself is not necessarily a disability, but in this case there is evidence from Wellbeing Services that depression and anxiety were a concern.
22. It is not a case where there is only a note saying the claimant could not work due to stress. In determining whether an adverse effect is substantial, a tribunal must compare the claimant's ability to carry out normal day-to-day activities with the ability the claimant would have if not impaired. The claimant's evidence was that he was able to work before his mental condition deteriorated. Therefore, I do find that the adverse effect was substantial.
23. I think that the mental impairment existed before 29 September 2021. This is evidenced by the fact that the claimant spoke to his General Practitioner [GP] in August and was referred to wellbeing services. The GP note (in the bundle at page 43) states that there is a five to six year history of mental health issues. However, there is no evidence before me that there was a substantial adverse effect on the claimant in July or August 2021.
24. I have gone on to consider whether the substantial adverse condition was long term. I have concluded it was on the basis that it was likely to last twelve months. Likely should be interpreted as meaning it could well happen. In this case, taking into account the evidence that the claimant gave about his mental health since childhood, I find it was likely that his mental condition would be impaired for at least twelve months.

Employment Judge **Freshwater**

Date 16 October 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

18 October 2023.....

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FOR THE TRIBUNAL OFFICE