



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Hussain

**Respondent:** The Home Office

**Heard at:** Leeds (in public, by CVP)

**On:** 21 November 2023

**Before:** Employment Judge Buckley

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr Keith (Counsel)

## PRELIMINARY HEARING IN PUBLIC JUDGMENT

The judgment of the Tribunal is as follows:

### Strike out of part of the claim

1. The complaint of **direct disability discrimination** is struck out under Employment Tribunal Rule 37(1)(a) because it has no reasonable prospect of success.
2. The application to strike out the remainder of the claims of direct discrimination and harassment is refused.

### Disability

3. At the relevant times the claimant was a disabled person as defined by section 6 Equality Act 2010 because of depression and anxiety.
4. The complaints of failure to make reasonable adjustments can therefore proceed.

## WRITTEN REASONS - DISABILITY

5. Written reasons were requested.
6. It is conceded that the claimant was a disabled person at the relevant time as a result of IBS and epilepsy,
7. The claimant confirmed that he relied only on his depression and anxiety in relation his claim for failure to make reasonable adjustments. It was therefore not necessary for me to decide if he was a disabled person as a result of his sciatica or any other conditions.
8. The relevant period of time is from about April 2022 to about February 2023.
9. The questions for me to answer are:
  - a. Was the claimant suffering from the impairment of depression and anxiety at the relevant time?
  - b. What would the effects of his depression and anxiety on his ability to carry out day to day activities at the relevant time have been, had he not been taking medication for his anxiety and depression?
  - c. Were those effects long term substantial adverse effects?
10. I took account of the claimant's impact statement, his oral evidence and the medical evidence contained in the preliminary hearing bundle.
11. I accept the claimant's oral evidence as the trajectory of his condition. I accept that the depression and anxiety began in about 2017 and became significantly worse in about 2018 as a result of a particular incident in his life. Since then there have been some better and some worse periods. In October 2021 his daughter was born prematurely and stopped breathing and this incident caused his symptoms to worsen. I accept the claimant's evidence that the period between April 2022 and February 2023 was one of the bad periods, and after that time the position deteriorated further until he was too ill to work.
12. Since 2018 the claimant has been prescribed a variety of different anti-depressant and anti-anxiety medication. I accept his evidence that he has taken this medication since 2018 even though the patient record only runs from October 2021.
13. Since October 2021 the record of medication shows that he has regularly and repeatedly been prescribed anti-depressant medication, initially Sertraline and then Fluoxetine, even though the prescriptions recorded do not cover every single day during that period. Further the claimant has been regularly and repeatedly prescribed Propanalol for use as needed when he has panic attacks.

14. The claimant gave evidence about the effect of his depression and anxiety during the relevant period. Mr. Keith submitted that the claimant was unlikely to have a reliable recollection about the effects of his depression during the relevant period given the passage of time. I accept that recollection fades with time, but the relevant period is between 9-18 months ago, which is not so far ago to make the evidence unreliable. Further, the evidence of the claimant is the best evidence available to me about the effects on his day-to-day activities at the relevant time.
15. In addition, when I asked the claimant to recall the effects of his condition during particular periods when he had not been taking medication have given clear and convincing evidence of the impact on him during two periods in 2020 and 2022. These were periods when the claimant was not taking any medication, because he was attempting to try to treat himself naturally without the use of drugs. The attempts were unsuccessful and I accept his description that he was 'mentally destroyed' during these periods.
16. The medical evidence in the bundle was broadly consistent with his account of his symptoms even though I did not have the full GP notes before me.
17. For those reasons, I accept his evidence on the effects of his condition during the relevant period, and during the two periods during which he was not taking medication. Based on that evidence I find that the claimant's depression and anxiety would have had the following adverse impact on his day-to-day activities during the relevant period if he had not been taking any medication.
18. The impact on his activities falls into two broad categories.
19. First, the claimant suffered from an inability to concentrate, or to enjoy things he used to enjoy, because he was ruminating on matters that he was stressed or anxious about or which were making him feel down. He did not use the word ruminating, but he described it as 'my brain is somewhere else thinking about these things which are affecting me and making me sad'. This seems to me to be accurately reflected in the word ruminating – a cycle of negative thoughts. However, the word is used in this judgment simply as a shorthand for the words the claimant used, rather than as an attempt at a medical opinion.
20. This had, or would have had if he had not been taking medication, the following impacts on his ability to carry out day-to-day activities:
  - a. Going for a walk – when he was not taking medication, he could not enjoy going for walk because he was ruminating on things that made him anxious or sad.

- b. General work-related activities such as processing information – even when not taking medication he did this at a slower speed because he was ruminating and his brain was elsewhere.
  - c. Lack of sleep – tossing and turning because he was ruminating.
21. The second broad category of effects on day-to-day activities stems from a lack of motivation:
- a. Shaving – he lacks the motivation to shave, although he does so when taking medication. In the periods when he was not taking medication, he did not shave.
  - b. Eating with family – he lacks motivate to come down and eat with family, although he does this when taking medication. When not taking medication, he mainly remained in bed.
  - c. Preparing a meal – he lacks motivation for preparing a meal.
  - d. Meeting up with friends – he lacks motivation to do this when taking medication. When not taking medication, he found that even communicating with friends was a struggle and he would feel unable to rely to messages.
  - e. Taking a shower - when not taking medication he did not have the motivation to have a shower.
  - f. Going for a walk - if the claimant attempted to go for a walk when he was not taking medication he would feel intimidated and scared and would just come straight back and go to bed.
22. On the basis of the above findings of fact, I find that the clamant had the impairment of depression and anxiety since 2018. It is not clear that this is disputed by the respondent. It appears to be accepted in the letter of 5 October 2023 although it was addressed by Mr. Keith in his skeleton argument.
23. Having set out the effects on the claimant’s day-to-day activities it is clear to me, and I find, that the effects on his day to day activities set out above, disregarding the effect of medication, would have been more than minor or trivial. It is also clear to me and I find that the effects even with medication were more than minor or trivial during the relevant period.
24. I note that the claimant’s condition started in 2017/2018, that he has been prescribed anti-depressant medication through that period and that there was a deterioration after the birth of his daughter in October 2021. On that basis I find, at the start of the relevant period and throughout that period, the effects were long term in the sense that they had lasted and were likely to last for a period of at least 12 months.

**WRITTEN REASONS – STRIKE OUT/REFUSAL TO STRIKE OUT**

25. There has been a previous case management hearing where the claims were discussed and the issues clarified. Subsequently the claimant provided further information and an amended agreed list of issues was produced. I discussed this with the claimant and some small amendments were made. I was satisfied that the claim was sufficiently clear to consider the applications for strike out.

*Direct disability discrimination*

26. The claimant claims direct disability discrimination. He claims that the alleged discriminator:
- a. failed to refer him to occupational health (OH) between July and November 2022 or delayed that referral, and
  - b. failed to provide him with a reasonable adjustments passport on the METIS system as requested on or around June 2022.
27. Section 13(1) of the Equality Act 2010 provides as follows:
- “(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”
28. Under section 23:
- “(1) On a comparison of cases for the purposes of section 13...there must be no material difference between the circumstances relating to each case.
- (2) The circumstances relating to a case include a person's abilities if—
- (a) on a comparison for the purposes of section 13, the protected characteristic is disability;
- ...”
29. I explained to the claimant the nature of the comparator in direct disability discrimination cases i.e. an individual with the same abilities who did not suffer from the claimant's disability. In simpler terms, the reason why the claimant was treated as he was must be his disability.
30. I asked why the claimant thought that he would have been treated differently if he had not had the disability, i.e. why he would have been referred to OH earlier if he had not had the disability and why he would have been provided with a reasonable adjustments passport if he had not had the disability.
31. The claimant stated that he thought it was because of cost – the respondent thought it would be expensive to make reasonable adjustments.
32. Even if the claimant is right that the respondent failed to or delayed in making an occupational health referral or failed to provide the claimant with a reasonable adjustments passport on METIS because the respondent thought it would be

expensive to make reasonable adjustments, that would not amount to direct discrimination because of disability. The reason has to be the claimant's disability.

33. Direct discrimination cannot be justified, whereas the provisions on reasonable adjustments only require an employer to make such adjustments as are reasonable. As the EAT points out in **Cordell v Foreign and Commonwealth Office** [2012] ICR 280 (under provisions in the Disability Discrimination Act 1995 which are not materially different for these purposes) if avoiding or refusing reasonable adjustments on the grounds of cost amounted to direct discrimination this would make the reasonable adjustment provisions effectively redundant:

"The Act plainly intends that in cases of this kind the employer should have a defence if he can demonstrate that the practical difficulties of making the adjustment in question, including the costs, are disproportionate. If it were legitimate for the employee to say "I know that the reason for your decision is the cost, but the reason for the costs is my disability, so the case falls within section [13]", the opportunity for justification would in every case be short-circuited."

34. For those reasons, even if the tribunal were to accept the claimant's case taken at its highest, it would not amount to direct discrimination. I therefore conclude that the claim for direct disability discrimination has no reasonable prospects of success. I exercise my discretion to strike it out on the basis that it would be disproportionate and a waste of time and money for the parties and the tribunal to for the matter to be determined at the full merits hearing.

*Refusal of strike out of other discrimination/harassment claims*

35. Strike out is not prohibited in discrimination claims but I have to take especial care. I note that the case law recognises that it is very rarely appropriate if a claim turns on factual issues. This is guidance. It is not a rule to be applied in every case and does not replace the wording in the statute.
36. Mr. Keith recognises this, but submits that in this case even if the facts put forward by the claimant are established (which are for today's purposes assumed), there is no link between the treatment and the protected characteristic. The burden of proof would not shift. In effect he submits that there is no reasonable prospect of the claimant succeeding on the 'reason why' issue or the 'related to' issue in the harassment claims.
37. The only person who knows why she acted as she did is the alleged discriminator. It is rare to have direct evidence of a discriminatory motive, because people usually avoid saying or writing down the fact that they have acted on grounds of race or sex or religion. It is not a fanciful assertion that

someone might be, for example, racist or sexist, and I do not accept that this is a case where there is realistically only one possible outcome.

38. Often, in discrimination cases, the tribunal's conclusions on why the discriminator has acted as they did will have to be based on any inferences that it considers are appropriate to draw, having heard evidence on both sides about the whole course of conduct. The tribunal is not prevented from hearing, accepting or drawing inferences from evidence adduced from the respondent in determining whether or not the burden of proof has shifted at the first stage (**Makysymiuk v Bar Roma Partnership** [2012] All ER (D) 377).
39. The claimant's case, in essence, is there was a course of unreasonable conduct by his manager which he will ask the tribunal to infer, in the light of all the evidence, was on a prohibited ground. I do not consider it appropriate to strike out the claims on the basis that there is nothing more, at this stage, than the fact of unfair treatment (assumed) and the fact of a difference in race/sex/religion. There is a crucial core of disputed fact in this case, which is why the alleged discriminator acted as she did.
40. On that basis I conclude that it is not appropriate to make a deposit order. I am not persuaded that the threshold of no reasonable prospects of the claimant succeeding in relation to the 'reason why' issue has been reached.
41. Mr. Keith raised one other issue, which was the question of whether there were little reasonable prospects of the claimant persuading the tribunal that a particular exchange on Teams amounted to a detriment/satisfied the definition of harassment.
42. It was clear from what the claimant said today that there were further aspects to this exchange in terms of context and in terms of what was said next, that would need to be considered by the tribunal before it reached a conclusion as to whether the conduct met the appropriate threshold. On that basis I conclude that it is not appropriate to strike the claim out. I am not persuaded that the threshold of no reasonable prospects of the claimant succeeding on this issue has been reached.

**Employment Judge Buckley  
22 November 2023**

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