EMPLOYMENT TRIBUNALS

Claimant: Miss M S

Respondent: Ivo Dentech Limited

HELD AT London Central Employment Tribunal (by CVP)

On: 7 December 2023

Before: Employment Judge Adkin sitting alone

Representation:

For the Claimant: Mr F Clarke, of Counsel
For the Respondent: Mr M Williams, of Counsel

REASONS

Background

1. These are written reasons for my decision given orally at a preliminary hearing in public (by CVP) on 7 December 2023 that the Claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 at the times material to her claim 1 November 2022 to 17 May 2023 by reason of depression and anxiety. I did not find that migraine amounted to a disability at the material time.

2. Oral reasons for that decision were given orally in the hearing on 7 December.

3. Written reasons were requested by email.

Rule 50

4. I have granted the Claimant's application under rule 50 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 ("the Rules") that the Claimant's name should be anonymised.

5. I have given full weight to the principle of open justice and the Convention rights to freedom of expression (ECHR), however in this case I find that this is outweighed by the Claimant's art 8 right and that section 12(1) of the Employment Tribunals Act 1996 (i.e. evidence of a personal nature which might be reasonably assumed to be likely to cause significant embarrassment) is engaged in this disability case such that it is appropriate to anonymise her name pursuant to rule 50. That is based on the content of the Claimant's witness statement.

6. I have had regard to authority and consider that I should make the least restrictive order required to protect the Claimant. In those circumstances I am only going to order anonymity pending the decision on liability. It will be open to the Tribunal at the final hearing to continue that anonymity with a further order and the Claimant or her representatives should make an application at the final hearing if that they what they seek.

7. The parties or any other interested person with a legitimate interest may make an application for this order to be revoked or discharged on the basis of written representations or a hearing. In that event of course I would invite submissions from both parties.

Evidence

8. I received evidence in the form of a 105 page bundle of documents prepared for this hearing which includes the Claimant's disability impact statement at page 42.

9. I additionally received a witness statement from the Respondents witness Mr Mo (Mohammed) Almiani which is a three page witness statement dated 6 December 2023.

10. I have had the benefit of live witness evidence from the Claimant and also from the Respondent's witnesses who were cross examined by Counsel and answered questions of mine, I have had oral submissions from both Counsel and I am in fact grateful to both Counsel who substantially agreed on the legal principals and gave concise but helpful submissions on the question of disability.

Scope of decision

11. I should say there are four matters at the outset that I am expressly not making a finding on, these are:

    11.1. There was a work trip to Jordan. To what extent that was voluntary and events on that trip which occurred which appear to be disputed are not material to the central question of disability. I note there is a dispute, but I am not going to make findings about those matters.

    11.2. The noise levels in the Respondent's office before and after an office move. Again the parties were in dispute about this relevant to symptoms of migraine that the Claimant mentioned. I note the dispute about the level of noise, I am not going to attempt to resolve it and indeed it would be quite difficult for me to do that.

11.3. I am not dealing at this stage with the Respondent's knowledge of disability that is a matter for the final hearing.

11.4. I am not dealing with causation in this sense, the Claimant alleges that comments made by Mr Sinale in February 2023 caused her to suffer injury again I am not making findings about that, that might be a question for the final hearing.

Findings of Fact

History in Romania

12. The Claimant is Romanian, she was born in 1989. she did not move to the UK until 2017.

13. She says that she suffered from some traumatic events in her childhood, they are described in her witness statement in outline, although not in detail, I am not going to describe those for the purposes of these reasons which might be published online if they are asked for in a written format.

14. There is no contemporaneous corroborative evidence as there is no record at all from the Claimant's life in Romania. However, this history is noted in a GP doctor record on 9 June 2023. It is not being contended that the Claimant made this history up and I find it would be a surprising allegation or matter for the Claimant to volunteer in a public process if it were not based on some traumatic childhood event. So, I accept on the balance of probabilities that there was some traumatic childhood event and I also accept what the Claimant says which is this has had a long term effect on her.

15. In July 2013 the Claimant's then partner or boyfriend died in a road traffic accident or shortly after a road traffic accident. She was at that stage 23 years old. There is not any contemporaneous evidence of this but again I accept this evidence, I find that it is more likely than not that it did occur and that it did cause a lasting impact on her mental health.

16. I accept the Claimant's evidence that she had therapy sessions at that time, and I also accept that she found out the content of that therapy was not kept entirely confidential and that did cause her some distress. She says she was described anti-depressant medication in Romania, again I do not have documentary evidence, but I do not have a basis to doubt that that did occur, I find that she was prescribed anti-depressant medication in Romania.

Move to UK

17. In September 2017 the Claimant moved to England. Thereafter she did not take anti-depressant medication until March 2022. Between August 2020 and late 2021 the Claimant was in an abusive relationship. Her then partner had a substance abuse problem, the Claimant says, and I accept that she felt isolated from

colleagues, friends and family at that time and there was involvement with law enforcement. Those events took place in Southampton and at a later stage the Claimant moved to London.

18. On 19 September 2019 the Claimant sustained an ankle injury described as an inversion injury and also a laceration to her right knee. The detail of that injury is not relevant to the question of disability, but it just shows how far back the London based general practitioner records go.

Counselling

19. In April 2021 the Claimant started counselling which led to eight sessions of counselling. This was extended to nine sessions of counselling that seems to still have been at the time that she was living in Southampton. I have had the benefit of reading a letter from Carol Moore, a counsellor who described in a letter at the conclusion of that counselling treatment the abusive relationship which the Claimant had been involved. I note that that letter refers to the partner as being in the present tense although I understand from the evidence in today's hearing that that relationship did come to an end and the Claimant began a different relationship. Ms Moore refers in that letter to the symptoms of depression and anxiety, by the letter dated 16 September the Claimant was discharged back to the care of her general practitioner.

20. The Claimant says that following on from counselling with Ms Moore she had some further telephone counselling outside the NHS with a lady called Joanne. We do not have records, but I accept that there was some further counselling.

21. On 15 March 2022 the Claimant saw her GP in London and reported low mood and there is a reference to some online therapy. On 16 March there is a detailed record that says the Claimant "thinks she need medication" but it is also said that she "feels safe" that she is advised to call the police if she is not safe, I take that to be a reference again a problematic relationship. At that time the Claimant was prescribed Sertraline, which seems to be the first time she was prescribed antidepressants since she lived in the UK, and she is prescribed 50mg tablets one to be taken each day for 28 days.

22. A couple of weeks later on 31 March 2022 there is an investigation of possible diabetes, this relates to a recent history of feeling faint and a family history of the Claimant's maternal grandmother having diabetes. There is a telephone consultation, and the doctor's note record that the Claimant feels very shaky, she says she has had symptoms for one year, she feels she needs to eat something when she is shaky and notes that her mother's side of the family has diabetes.

23. A further couple of weeks following on from that on 13 April 2022 there is a suspected depression is recorded in the GP record, this coincided with the death of the Claimant's father in April 2022.

Work for Respondent

24. The Claimant commenced working for the Respondent as a dental technician on 1 November 2022. The Respondent raised performance issues with her, and twelve weeks' notice was given to her on 17 April 2023.

Therapy

25. Four days later on 21 April 2023 the Claimant said she commenced thirteen sessions with a private therapist which ran until 17 June 2023, and this is in part evidenced by a receipt sent by email on 20 April 2023, that is at page 75 of the agreed bundle.

Hospital (London)

26. On 5 May 2023 the Claimant seems to have attended the Royal Free Hospital and there is an emergency department note, it records that this is a self-referral and there is an indication of migraine, instructions for taking Sumatriptan 50mg oral tablets. That is prescribed by Mohammed Adam Elmi, it is unclear to me whether he is a doctor or a pharmacist or some other practitioner.

Hospital (Southampton)

27. There is then somewhat surprisingly the following day on 6 May a University Hospital, Southampton note page 74 triage information and it say this

> "unresponsive ? seizure after altercation with partner
>
> [*the oral evidence in this hearing was that the Claimant said some of this information was provided by her partner*]
>
> Diagnosis: Depressive disorder– suspected diagnosis – Pseduoseizure / NEAD [*non epileptic attack disorder*]
>
> Suspected diagnosis evidence of collapse suggested of stress – response – not epileptic fall origin during argument with boyfriend was discussing a very triggering event at work which is triggering an underlying PTSD from previous traumatic experience anxiety trigger apart so given 2mg diazepam to take up to three times a day formal report from psych team will be sent to GP but they have articulated that Sertraline could be considered to support the current level of low mood and anxiety in the context of PTSD".

GP (London)

28. Three days later 9 May 2023 in the GP record, reason for fit note:

> has recently been discharged from A&E diagnosis stress response seizure due to work related stress [*the Respondent emphasises that this does not mention the boyfriend or partner*]

background of issues at work triggered PTSD, sexual harassment at work, blood test, CT all suggest normal values, diazepam prescribed suggested Sertraline to be prescribed by GP. Fit note starting today 9 May 2023 for two weeks.

Anything the employer can do to help, employer informed about my health, not communicating or contacting me, my job cannot be performed from home. Employer considers there are no other suitable roles available for me, handed to me in writing at an earlier date.

ACAS / termination

29. The Claimant commenced the ACAS conciliation process on 15 May, her termination date I believe was 17 May 2023 although that is not crucial for current purposes.

Migraine

30. The also on 17 May 2023 the Claimant seems to have submitted to her GP via an app

> severe migrains/dizziness/also my vision affected – I also need my sick note amended please as per my emails durations and symptoms and whether improving: one year.

31. Then on two days later on 19 May her GP record says migraine (first) notes history: very long consultation multiple issues discussed.

(1) Chronic headaches "migraines" started over a year ago – then it says headaches almost every day for the last three months pressure starts at back and goes up the side, wakes up with headache, associated dizziness and nausea, vomiting, visual disturbance and then its say ("black veil in both eyes"), phonophobia, then it says, worse with smells e.g. cigarette triggers stress

Feels that her working environment is causing her symptoms, think she may have an allergy to allergens in the work environment, no motor/sensory disturbance, she has tried Ibuprofen, Paracetamol and Co-codamol nothing helps. Takes Sumatriptan daily some help but still having migraines.

(2) Asking for referral to allergy clinic, thinks she may have an allergy to allergens in the work environment.

Recent A&E attendance with ? seizure

- Advice to start Sertraline, patient states having been taking Sertraline for two weeks. Stating it was given to her by OOH Dr but not on her (medication list). Note also attended Barnet A&E 5.5.23 with neurological symptoms, CT head showed no abnormality, admits

probably has PTSD but did not give details. Having private talking therapy through “better help”

Tearful at times
Denies suicidal/self-harm ideation
Comment Propranolol for migraine, prophylaxis staring at 10mg OD and increase (very confusing) until symptoms resolved (max 80g OD) cancelled on side effects
Fit notes wants it to state migraines – had issued continue Sertraline, patient is adamant she was started on this recently and was running out – will issue 50mg – follow up tele consult with me 3/4 weeks pn secretary to chase psych report from Southampton General Hospital (I should note I have not seen that report) Note has been referred to community mental health, see consultation 11 May 2023. Prescribed Sertraline 50mg tablets one to be taken each day, 28 tablets.

The ACAS conciliation period ended on 6 June and then on 9 September 2023 the Claimant had a further consultation, had a telephone triage in Community Mental Health Hub 23 May 2023 likely to be PTSD from trauma re historical … abuse possibly depression and anxiety.

They started Sertraline 50mg OD started approximately two weeks ago and referred to IAPT feels medication is helping and she is feeling better … mood she still feels very low, feels that she does not want to live but denies suicidal plans or intent.

No harming others, not managing to eat well.

Examination speech normal rate, tone and volume, good repour established.

Mood effectively euthymic subjectively very low – comment increase Sertraline to 100mg OD

32. Now I note in that record there is no further reference to migraine at all.

GAD score

33. On 28 June 2023 there is a gad seven total score in where 15-21 is said to be severe, her score is 19. Then a claim is presented two days later on 30 June 2023.

The Law

34. The burden is on a claimant to show that she was a disabled person at the material time.

35. The Equality Act 2010 contains the following provisions:

6 Disability

(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.

Schedule 1 Part 1

Determination of Disability

Long-term effects

2(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.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

36. 'Likely' has been held to mean it is a "real possibility" and 'could well happen' rather than something that is probable or more likely than not. (SCA Packaging Ltd v Boyle [2009] ICR 1056). Here the House of Lords upheld Girvan LJ in the Court of Appeal (para 19):

> "The prediction of medical outcomes is something which is frequently difficult. There are many quiescent conditions which are subject to medical treatment or drug regimes and which can give rise to serious consequences if the treatment or the drugs are stopped. These serious consequences may not inevitably happen and in any given case it may be impossible to say whether it is more probable than not that this will occur. This being so, it seems highly likely that in the context of paragraph 6(1) in the disability legislation the word "likely" is used in the sense of "could well happen"."
>
> It has often been emphasised in the cases that the burden of proving disability rests with the applicant, who must bring medical evidence to establish this. Witnesses from any branch of medicine (including the professions related to medicine such as speech therapy) will be far more comfortable with assessing the reality of the risk rather than putting precise percentages upon it".

37. Underhill J (President) sitting in the Employment Appeal Tribunal in the case of **J v DLA Piper UK LLP 2010** WL gave some guidance:

> 40. Accordingly in our view the correct approach is as follows:
>
> (1) It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in Goodwin v Patent Office [1999] ICR 302 .
>
> (2) However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in para 38 above, to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings.
>
> (3) These observations are not intended to, and we do not believe that they do, conflict with the terms of the Guidance or with the authorities referred to above. In particular, we do not regard the Ripon College and McNicol cases as having been undermined by the repeal of paragraph 1(1) of Schedule 1 , and they remain authoritative save in so far as they specifically refer to the repealed provisions.

38. In that case guidance was given on cases in which mental-health, particularly depression, is said to amount to a disability:

> 42. The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at para 33(3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. **The first state of affairs is a mental illness—or, if you prefer, a mental condition—which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or—if the jargon may be forgiven—"adverse life events"**. We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians—it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod and Dr Gill in this case—and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some

> medical professionals, and most lay people, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para 40(2) above, a tribunal starts by considering the adverse effect issue 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.

Conclusion on disability

Respondent's position

39. The Respondent confirmed it position in relation to disability in a letter of 27 November 2023:

> "At this stage, the Respondent does not accept that the Claimant is a disabled person within the meaning of the Equality Act 2010.
>
> The Respondent disputes the Claimant's evidence around day to day activities and the impact her condition(s) have on these as set out within her Impact Statement. With this information being in dispute, the Respondent is not in a position to accept that the Claimant is disabled within the meaning of the Equality Act 2010.
>
> For the avoidance of doubt, it is denied that the Respondent had knowledge of the Claimant's disabilities at the relevant time or at all."

40. That was supplemented by counsel orally.

Depression/anxiety

41. I am going to deal with depression and anxiety first. I am grateful for to Counsel again for their submissions, there are four elements to this, and I shall be dealing with each of those in relation to both alleged disabilities.

Depression and Anxiety

42. Was there an impairment?

43. I find that there was an impairment that could be described as depression and anxiety. I find that is evidenced by the medical records and the Claimant's oral evidence which I accept.

44. Did that have an effect on day to day activities?

45. I accept that the Claimant did as emphasized by the Respondent attend new situations and social situations including a work trip to Jordan. I accept however that there were other occasions where she did avoid new situations or social situations when she was feeling particularly low. I find that to some extent the expectation of her employer would have meant that she would have put a brave face on matters and got on with it. I accept that there were times at which she struggled with eating or eating healthy and with household tasks and that she found an inability to focus.

46. Was this a substantial effect?

47. The threshold test is more than trivial. I accept that this is met in the circumstances in this case. New situations and social situations are day-to-day activities. I find that the Claimant was more than trivially affected by avoiding these situations when she was feeling low. I find that problems of motivation and an inability to focus are again more than trivial effects on day-to-day activities.

48. Whether this is long term?

49. I accept that the Claimant has had problems which will be described as depression and anxiety which have come and gone in relation to symptoms of depression and anxiety over a period of some years.

50. I have considered carefully the case of J v DLA Piper and whether this could be characterised as a situation where an individual has just had an occasional flare up or an occasional response to stress or difficult events but which is not really a case of what used to be called clinical depression.

51. I find that on the circumstances of this case that this is a case where depression has been a constant in the Claimant's life particularly symptoms of depression which although I accept that it does fluctuate from time to time. I accept the Claimant's oral evidence that depression has always been there since her childhood. So, I find the depression and anxiety did amount to a disability during the material period and the material period in this case is 1 November 2022 to 17 May 2023 which are the date of the Claimant's employment.

Migraine

52. Dealing separately with the question of migraine and whether that amounted to a disability under section 6.

53. Was there an impairment?

54. I find that the Claimant has suffered from a set of symptoms which seems to have been in relation to stressful situations, whether or not that is a migraine based on the medical records seems somewhat in question. It may be that it is and it maybe that it is not. I note that the Claimant was particularly anxious to correct her sick certificate to reflect that it was a migraine. I do not doubt that was her belief. I do also note that when the doctor put "migraine" in quotes that suggests that this was something that was being put forward by the Claimant rather than a definitive

diagnosis by the doctor. And I also note the context which this all follows on from the end of her working relationship with the Respondent.

55. Whether this has had an effect on the Claimant's day to day life?

56. I find that these symptoms have periods where it has affected her ability to work. Looking at the content of the Claimant's witness statement in particular the section dealing with migraine from paragraph 42-45, I am not satisfied that this has been fully made out. This is for a couple of reasons.

57. The first is that she never had a day off sick work from her employment with the Respondent.

58. The second is paragraph 45 relating to March 2023 the Claimant says the pain was unstoppable for weeks despite medication which used to be helpful prior, the difficulty that I have is that there is not contemporaneous evidence to support this.

59. To be absolutely clear I am not finding that the Claimant was dishonest, in fact I find that both she and also the witness giving evidence for the Respondent Mr Almiani were both honest in the evidence that they gave and they were both trying to assist the Tribunal as truthfully as they could. However, I do not find that the extent of the pain that is described in the Claimant's witness statement is supported by contemporaneous evidence of either her at employment or medical history. Whilst I have given the Claimant the benefit of doubt in relation to the lack of documentation events Romania given that those are historic matters and practical difficulties of obtaining records from another country, it seems to me that the Tribunal should have an higher expectation of contemporaneous documents for recent events. The lack of support documents are considered significant.

60. Substantial effect?

61. I have no doubt that the Claimant was suffering from a set of symptoms and certainly if one ignores the effect of taking medication such as Nurofen which she was taking or Ibuprofen this would be a substantial effect. I find that it is more than trivial. The Claimant does satisfy that aspect of the definition.

62. Long term?

63. I am not satisfied that this is long term. I note that the Claimant suggested in May 2023 that this was a problem of one year standing but looking back at it the symptoms reported in 2022 seem to be different and indeed the medics at that stage seemed to have been investigating on the basis that it was diabetes rather than migraine. I accept that the Claimant may subjectively consider that these are all connected but on the balance of probabilities I am not satisfied that these are the same set of symptoms and that the requirement to set out that there was a long term problem with migraine has been made out.

Employment Judge Adkin

Date: 11 January 2024

JUDGMENT SENT TO THE PARTIES ON

12/01/2024

FOR THE TRIBUNAL OFFICE

Reasons having been given orally at the hearing, the parties may apply for written reasons within 14 days of the date of this order being sent to them pursuant to rule 62 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1.