



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D. Warburton

**Respondents:** Libertas Chambers and 8 others

**Heard at:** London Central in public by CVP

**On:** 18 April 2024

**Before:** Employment Judge Goodman

## Representation

**Claimant:** Rad Kohanzad, counsel

**Respondent:** Stephen Wyeth, counsel

## PRELIMINARY HEARING

# JUDGMENT

The claimant was not disabled by depression, anxiety or ADHD at the relevant time.

# REASONS

1. The claimant is a barrister. He has brought proceedings against his former chambers, from which he was expelled in March 2023, claiming direct discrimination because of disability, discrimination because of something arising from disability, and victimisation.
2. The issue for this hearing is whether the claimant was disabled by depression, by anxiety, or by ADHD in the material period, January to March 2023.

## Evidence

3. The claimant was questioned on the impact of impairment on his ability to carry out day to day activities. A recently revised version of his statement,

adding material on the January to March 2023 period, was admitted to evidence at the start of the hearing.

4. I was provided with a bundle of 260 pages. From this I read the claim and response, the case management record of Employment Judge Emery, the general practice records disclosed as relevant by the claimant, and a report of April 2020 by Dr P. Grewal, consultant psychiatrist. In closing I was taken by counsel for the claimant to two passages from a document sent to members of chambers by the second respondent and Head of Chambers, explaining the reasons for the expulsion recommendation; these appear on pages 178 and 184 of the hearing bundle.
5. I have also read the September 2018 decision of Employment Judge Smail in case no. 3328266/17, 3332251/18 (a disability discrimination claim against Hertfordshire Constabulary for rejecting his application to join), finding that the claimant was disabled by depression from around June 2016, when he lost his job as a law lecturer, and was disabled at the material time, May to July 2017. There was no medical report in that case.
6. After hearing submissions I reserved judgment.
7. A further case management hearing was listed for 25 July 2024 to consider whether to order the claimant to pay a deposit in respect of any claim. The respondents outlined their heads of their argument today for the claimant's benefit but are expected to set this out in writing before the hearing.

### **Factual Summary**

8. There is no history of depression and anxiety before June 2016. Judge Smail noted in his 2018 judgement however that the claimant had told him of his lifelong struggle in forming social relationships.
9. The GP notes disclosed by the claimant as relevant in this case show a consultation with the GP in February 2018 when he changed his antidepressant medication from citalopram, because the claimant said it was not effective, to sertraline. The GP noted he had been out of work for two years, and that the claimant had not found counselling useful. He had no suicidal thoughts. The only other entry is dated 30 December 2020 when it appears that the claimant had contacted the surgery but did not respond to three telephone calls and a text message inviting him to make an appointment with a doctor. The reason for his call is not stated in the note.
10. As the claimant had been ordered to disclose GP and other medical records that were relevant by the 12th of January 2024, it can be concluded that the claimant has not consulted his doctor about any mental health difficulty since February 2018. The claimant says this is because he dislikes talking about his feelings in counselling sessions, or when visiting his doctor, and he also dislikes taking prescription medicine. He worries that antidepressants may become addictive.

### Dr Grewal's April 2020 report

11. In April 2020 Dr Grewal prepared a report, on joint instruction in another employment tribunal claim (about rejection of a pupillage application by 5 Essex Court). The doctor was asked whether the claimant was a disabled person between the 7 February and 19th March 2019. He reported that the claimant described increasing anxiety and frustration after successive rejections for job applications after June 2016. He began to feel worthless, irritable and suicidal. His sleep was disrupted. He had periods of irritability, including angry exchanges with strangers. He had found counselling unhelpful. Sertraline had been some help, but he had stopped taking it. His symptoms had improved after finding employment in January 2020, but he reported continuing sleep disturbance and irritability. He had married in 2019 and had a child. He had trouble motivating himself in basic daily tasks such as washing, dressing, organising his affairs, and communicating with his wife without irritable outbursts. He had lost interest in gardening, DIY and cycling. He was drinking about two bottles of wine a week. The doctor noted he was dishevelled, with poor eye contact, and was agitated and fidgety throughout. His mood was low but there was no thought of self-harm or suicide. He had poor concentration, reduced libido, disturbed sleep and early morning wakening. On two occasions in the interview he lost his train of thought.
12. Dr Grewal concluded that the claimant was suffering from a severe depressive episode without psychotic symptoms, and had so suffered since 2016, although the precise time of onset was unclear.
13. On treatment and prognosis he said: “depressive disorder is generally regarded as a treatable disorder. However, Mr Warburton has not responded to treatment arranged by his GP. His symptoms have persisted for approximately 4 years and he continues to be unwell despite his return to employment. It is possible he suffers from a coexisting mental illness”. His symptoms would continue:

“until he is able to stabilise and secure his employment. This should improve his self-esteem and sense of purpose. It is likely that he will continue to suffer from residual symptoms of depressive disorder that require further steps psychiatric treatment”.

If that happened, the claimant should present to his GP in the first instance for a higher dose of antidepressant medication and at least 12 sessions of cognitive behavioural therapy, and if that was unsuccessful he should be referred to specialist mental health services.
14. Dr Grewal expanded on his suggestion of coexisting mental illness. The claimant might suffer adult ADHD. In adults this included impulsivity, lack of organisation, excessive activity or restlessness, low frustration for tolerance (sic), sleep disturbance, low self-esteem, sensitivity to criticism and increased impulsivity. He needed specialist assessment for this. ADHD could make his depressive symptoms worse, and depression could worsen his ADHD symptoms. That could explain why conventional treatment for depression had not been as effective as expected.
15. There is no further evidence about ADHD. The claimant has not followed up with ADHD assessment.

The Claimant's activities after April 2020

16. Dr Grewal was unaware when he wrote his report that the claimant (as he reports in his impact statement) had secured some part-time work in 2018, lecturing for 4 hours a week in term time, a post which he continues to hold.
17. As Dr Grewal noted, the claimant had started pupillage in January 2020 and his symptoms had begun to improve. The claimant explains that this was still not straightforward progress, because of the intervention of lockdown in March 2020, with suggestions that he might be made redundant, or not complete a second six, and he was furloughed for some periods. He did however complete pupillage in May 2021. He was then accepted as a tenant at Erimus chambers in Luton. While working there he decided he wanted work more demanding than routine road traffic offences and looked to move on. He was accepted as a tenant at Libertas (the respondent) in April 2022.
18. The witness statement is sparse in information about the claimant's symptoms after seeing Dr Grewal. The claimant states that client feedback since he has been at the bar "well evidences my effectiveness...which brought me feelings of satisfaction". He threw himself into work, accepting almost every instruction offered, but outside work, he says, he continued to have no motivation for exercise, social life, gardening or travel, and was constantly worried about the security of his career.
19. The claimant describes in paragraph 28 the increased anxiety caused by "nefarious bullying from January 2023 onward" by his head of chambers.
20. The events from January 2023 to which the claimant here refers include:
  - (1) being informed that a complaint had been made to the head of chambers (second respondent) by the Chair of the Criminal Bar Association about the tone of the claimant's correspondence with her (notably an email of 30 September 2023) arising out of government negotiations with the criminal bar about legal aid levels,
  - (2) questions being asked of him about several current employment tribunal proceedings he had brought which hitherto were not known to chambers,
  - (3) a referral to head of chambers about the claimant's suitability for the retrial in a criminal case in which he had appeared in December 2022, where the jury had to be discharged because of an error on his part, involving correspondence with the trial judge and prosecuting counsel, and
  - (4) a complaint to the Bar Standards Board about the claimant's fitness to practice by his head of chambers.
21. In the recently updated section of the witness statement dealing in more detail with how the claimant was between January and March 2023, he describes how he became increasingly anxious and oppressed. His sleep pattern became even more disturbed. His mood swung between anger and despair. In "February to March 2023" he had a breakdown. He explained this meant

that he had cried when he got home, but he did not describe interruption or exacerbation of other activities. He was consumed with the behaviour of chambers and had no desire for anything domestic. He ordered food in because he was too tired to cook.

22. It was not easy to understand how this differed from how things were before January 2023. In another addition to the statement, he explains that his card records show he has not done a food shop since 2020, nor does he shop for clothes, exercise, or do recreational reading, and that he does under 10% of the childcare, because he cannot relinquish his focus on work. He remains a recluse.
23. In April 2023, after expulsion, he began to feel suicidal. He made applications to about 50 sets for tenancy and was eventually successful. His first set of instructions at his new chambers was on 1 June 2023.

### **Relevant Law**

24. A person has a disability within the meaning of section 6 of the 2010 Act if he or she (1) has a physical or mental impairment which has (2) a substantial and (3) long term adverse effect on that person's ability to carry out normal day to day activities.
25. Substantial is defined in section 212 of the Act as meaning "more than minor or trivial". This is a question for a tribunal - **Elliot v Dorset County Council (2021) IRLR 880**. Tribunals must consider what a claimant cannot do, not what he can do.
26. Paragraphs 2(1)(a) and (b) of Schedule 1 to the 2010 Act define long term, as "has lasted at least 12 months" or "likely to last at least 12 months". "Likely" in this context means "could well happen": **Boyle v SCA Packaging Ltd. (2009) UKHL 37**.
27. Paragraph 2(2) of Schedule 1 adds: "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".
28. The question, therefore, is whether, at the time of the alleged discriminatory acts, the effect of an impairment is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts, not from hindsight. A tribunal is making an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months - **McDougall v Richmond Adult Community College EWCA (2008) ICR 431**. The same analysis must apply to the interpretation of the phrase "likely to last at least 12 months" in paragraph 2(1)(b) of the Schedule. Paragraph C4 of the Guidance issued by the Secretary of State under section 6(5) of the 2010 Act makes this clear when it states that in assessing the likelihood of an effect lasting for 12 months,

"account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood" - **All Answers Ltd v W and anor (2021) EWCA Civ 606.**

29. Where the mental impairment is depression, tribunals have EAT guidance in **J v DLA Piper 2010 ICR 1052**. Low mood maybe a normal reaction to adverse life events, rather than clinical depression, but if the reaction to an adverse life event is long time, it is likely to be illness (clinical depression). The same case discusses whether depression is likely to recur. It cannot be assumed that it will, it depends on the evidence. Where the question is whether a substantial adverse effect is "likely to recur", medical evidence of is of high importance - **Swift v Chief Constable of Wiltshire Constabulary 2004 IRLR 540**. Medical evidence can point to circumstances in which the substantial adverse effect is likely to recur and can help the tribunal consider in practice how likely it is that those circumstances will occur. A tribunal could also look at whether adverse effect had recurred in particular circumstances. The recurrence need not be likely to last 12 months. The impairment is treated as continuing for as long as its substantial adverse effect is likely to recur. On the subject of medical evidence, in **Royal Bank of Scotland plc v Morris EAT/0436/10**, it was observed that "in cases where disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance", given the subtle issues such as likely duration and risk of recurrence.
30. The distinction between reaction to adverse life events and depression was considered further in **Herry v Dudley Metropolitan Council [2017] ICR 610**, where events and work had led to long-term absence. The EAT noted: "Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an employment tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality". It was relevant in that case that the claimant could undertake other activities other than work. Adjustments had been made for a long employment tribunal hearing, but participating in a hearing was not a normal day to day activity or part of his work as a teacher.

### **Discussion and Conclusion**

31. If it is right that the claimant was anxious and depressed by his position in chambers from January to March 2023, some assessment must be made of the level of any impairment before then and since.
32. The claimant's illness in 2019 was related by Dr Grewal to his loss of employment and unsuccessful search for work. He had improved since starting pupillage in January 2020, he was expected to carry on improving. Despite the uncertainties of lockdown, he was able to complete pupillage, start in tenancy, move on to more demanding work, and then throw himself into what on his own account was successful practice, until the setbacks of January 2019. All that suggests substantial improvement in his symptoms.
33. However, the claimant narrates an inability to do anything but work – no wish to garden or shop or do more than minimal childcare, socialise or read for

pleasure. There is little objective evidence to demonstrate this, but when there is some detail it is not wholly supportive. His card records show he has not done a big shop from January 2020. That suggests he did do the shopping *before* then, when he was depressed. It coincides with the start of pupillage when his symptoms were noted to have *improved*. It could well be that he has been too busy to do a big shop, rather than impaired by depression. Lack of time, rather than a depressive illness, could also account for disinclination to do much in the garden or shop for clothes. There is no account of how much the claimant shopped for clothes when not unwell, or what gardening he did then. Unimpaired people can spend little time gardening and wear their clothes till they fall apart.

34. For reasons given by the claimant there is no assistance from medical records. He has not sought treatment since 2018. This does not mean he was not suffering symptoms of depression, but it does make it hard to get some objective handle on the level of symptoms at any time, or whether they fluctuated.
35. The finding of Judge Smail about social relationships (arising from early life experiences) may account for not socialising – the tribunal does not know what level of social life the claimant would see as normal and impaired by depression.
36. The claimant does not report the drinking or dishevelment reported to Dr Grewal. He does not discuss how other life changes may affect his activities – for example, becoming a parent, which is time consuming, even on 10% of the childcare, and might prevent a parent spending time cycling or reading for pleasure when building a practice at the bar. The respondent represented that the restriction of non-work activity was “the customary lifestyle of most barristers”. That is also often the case with working parents of young children.
37. The tribunal considered the tone of the correspondence which led to the complaint from the Chair of the Criminal Bar Association. The claimant does not seek to say this was because he was irritable because of depression; to the contrary, he does not accept there was anything objectionable in it.
38. The lack of evidence of the impairment of activity leads the tribunal to conclude that the claimant was not substantially impaired from, say January 2021 when the claimant was into his second six and then making progress in his career, until January 2023 when he came under scrutiny from his head of chambers. At that point, the tribunal accepts substantial impairment.
39. Does this continue, or when did it end? There is little evidence after April 2023. The claimant was able to look for other chambers, was well enough to be accepted elsewhere, and has been well enough to practice from June 2023. This indicates impairment from mid-January to say the end of April or perhaps the beginning of May 2023.
40. Viewed from March 2023, it cannot be said it was substantial. The timing suggests a reaction to adverse events. Nothing then showed it was likely to last more than twelve months.

41. Was it a recurrence of an underlying condition? Dr Grewal's report does not help the tribunal on this. There was no relevant history. He attributed the claimant's state in 2020 to the unsuccessful search for employment and saw no reason why it should not continue to improve. It has improved. He has been able to build a career in a demanding profession. The tribunal concludes that the claimant's depressive state in the early months of 2023 was a reaction to a sea of troubles at that time, not a recurrence of an earlier illness.
42. In conclusion, the tribunal does not find that the claimant was a person under disability at the relevant time.

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Employment Judge

Date 3 May 2024

JUDGMENT SENT TO THE PARTIES ON

21 May 2024

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FOR THE TRIBUNAL OFFICE

**Notes**

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