



EMPLOYMENT TRIBUNALS

Claimant: Mr S Knuckey
Respondent: London Fire Commissioner
Heard at: Remote hearing
On: 22 May 2024
Before: Employment Judge Harrington

Appearances

For the Claimant: Mrs S Mitchell, Lay Representative

For the Respondent: Mr B Amunwa, Counsel

JUDGMENT

- 1 At all relevant times, the Claimant was not disabled as defined by Section 6 of the Equality Act 2010.
- 2 Accordingly, the Claimant's claim for disability discrimination is not well founded and is dismissed.

REASONS FOR JUDGMENT

The numbers in square brackets refer to pages within the agreed preliminary hearing bundle.

Introduction

- 1 This case comes before me today as an Open Preliminary Hearing to determine the question of disability.
- 2 By way of background the Claimant, Mr Knuckey, presented claims of unfair dismissal and disability discrimination to the Tribunal in an ET1 received on 16 February 2023 [1].

- 3 The Claimant was employed as a firefighter from 2005 until 7 October 2022, when he was summarily dismissed. It is the Respondent's case that the Claimant was dismissed following a failed drugs test after a routine periodical medical examination [21-28].
- 4 Following the submission of his ET1, the Claimant produced a 'Better Particulars of the Claimant's claims for Discrimination and Harassment' [30-32]. On 27 November 2023, a private Preliminary hearing was held before Employment Judge Heath [33]. At that hearing, it was confirmed that the final hearing will take place at the Croydon Employment Tribunal on 25 - 28 June 2024. Various further case management directions were given concerning the Claimant's application to amend and for general case preparation.
- 5 Within the Case Summary section of the Order [38-39], the Claimant's complaints were listed as follows,
- 35.0 Unfair dismissal;*
35.1 Direct disability discrimination;
35.2 Discrimination arising from disability;
35.3 Disability related harassment;
35.4 Breach of the duty to make reasonable adjustments.
- [39]
- 6 Within the draft List of Issues annexed to the Case Management Order, it was noted that the Claimant alleged he had a disability pursuant to Section 6 of the Equality Act 2010 and that the relevant period of time for the claim of disability discrimination was 21 June 2022 to 17 January 2023.
- 7 In correspondence between the parties and the Tribunal, and within the Amended Grounds of Resistance, it was confirmed that the Respondent did not concede either of the Claimant's alleged disabilities which were said to be depression and anxiety and chronic pain [67, 71].
- 8 The Claimant's application to amend his claim was considered and refused by Employment Judge Heath in a decision dated 20 February 2024 [102 - 106].
- 9 In a letter from the Tribunal, dated 1 March 2024, Employment Judge Corrigan instructed that an Open Preliminary Hearing would be listed as soon as possible to deal with whether or not the Claimant had a disability or disabilities at the relevant time(s) and whether or not he had an excluded disability (as identified in the Respondent's Amended Response at paragraphs 8 - 10).

- 10 The letter also referred to the Respondent's concerns that the Claimant had redacted the medical evidence. It was emphasised that only parts of the medical evidence which were completely irrelevant should be redacted. The Claimant was required to confirm that he had complied with the order to disclose all relevant medical evidence by 22 March 2024.
- 11 In a further letter from the Tribunal, dated 18 March 2024, it was confirmed that the date for exchanging witness statements for the final hearing was stayed pending the Preliminary Hearing [109]. The parties have subsequently agreed to exchange statements on 7 June 2024 [125-126].
- 12 In an updated Draft List of Issues, in addition to a claim of unfair dismissal, the discrimination claims are pleaded in the following ways: direct disability discrimination, harassment related to disability, discrimination arising from disability and a breach of duty to make reasonable adjustments [116 - 124].
- 13 This is the background to the Open Preliminary Hearing which was listed before me today to,
- 'deal with the issues of whether or not the claimant had a disability or disabilities at the relevant time(s) and whether or not he had an excluded disability.'*
- [96]
- 14 As stated, the alleged disabilities relied upon are depression and anxiety and chronic pain.
- 15 The hearing was conducted remotely with Mr Amunwa of Counsel representing the Respondent and the Claimant represented by his mother, Mrs Mitchell. I was provided with the preliminary hearing bundle (including the Claimant's Disability Impact Statement), a copy of the Respondent's written submissions and two further emails sent by Mrs Mitchell at 7.33am and 7.45 am on the morning of 22 May 2024, each with a number of attachments.
- 16 I heard oral evidence from the Claimant and closing submissions from both parties. Due to a lack of available time, I reserved my judgment.

Findings of Fact

- 17 My findings of fact are set out below. The standard of proof is on the balance of probabilities or, to put it another way, what is more likely than not.
- 18 In addition to working as a firefighter, the Claimant has run his own company for a number of years carrying out roofing work. At all times,

he has regularly undertaken a job every fortnight, which lasts for approximately 1 - 2 days. The workload is sufficient as to require additional labour. Since December 2022 he has worked with Mr O'Sullivan (see paragraph 44 below).

- 19 It is agreed that in February 2017 the Claimant was involved in a road traffic accident, which led to him suffering back and leg pain. Consequently, he was absent from work for 15 weeks in 2017 and for 31 weeks in 2018. It was during this time that the Claimant was prescribed Naproxen and Tramadol. Post-accident, the Claimant was unable to pursue his pre-accident activities of high intensity gym workouts and playing rugby. The Claimant returned to work on light duties from 20 December 2018.
- 20 I accept the Claimant's evidence that in 2019 his pain had significantly improved. He describes his condition in the following way, '*I was still in slight pain but I could go to work....*' [130]. The finding that the Claimant's physical condition had improved is also supported by the fact that his Watch Manager kept '*trying to convince*' the Claimant to go for promotion [130]. On balance, I am satisfied that this was because the Claimant was fully capable at work and was performing well in his role.
- 21 In 2020, during the Covid pandemic, the Claimant served as an ambulance driver. As stated by the Claimant in his statement, he felt '*really good during this period*' and '*the pain in my lower back and leg had almost gone*'. The Claimant continued to '*feel physically stronger*' when he returned to the fire station in October 2020 [130].
- 22 The Claimant took a further posting of ambulance driver support at the beginning of January 2021. Upon his next return to the fire station in July 2021, the Claimant was on light duties because of a need to carry out updated training rather than because of any concerns with his physical health [130].
- 23 From 24 November 2021 - 2 February 2022, the Claimant was signed off from work with sciatica.
- 24 At this stage, it is important to note that despite the directions given by Employment Judge Corrigan in March 2024, the Claimant has failed to disclose the entirety of the relevant medical evidence. Whilst the Claimant said in evidence that the matters redacted in the medical records and letters were entirely irrelevant, he later accepted that this assertion was incorrect. For example, the Claimant accepted that the lines redacted concerning the appointment he attended on 10 August 2022 related to his mental health [141].
- 25 In addition to the disclosed medical records being heavily redacted of relevant material, no medical records have been provided from 22 September 2022 until 17 January 2023. The Claimant gave evidence

that he did not disclose records for this time period because he did not consult a doctor during those months. However the Claimant did consult a doctor in October 2022 in order to receive the letter dated 12 October 2022 [144].

- 26 As a result of these issues, I concluded that the medical evidence provided only a partial picture of the Claimant's contact with his GP over the short period of time covered by the disclosed records. Details concerning medical consultations, diagnosis, treatment and prognosis were incomplete. Accordingly, I did not rely upon the medical records when making my findings of fact, without further evidence in support.
- 27 As previously stated, from 24 November 2021 – 2 February 2022, the Claimant was signed off from work with sciatica. The Claimant was taking Naproxen at around this time as confirmed in the clinic letter dated 23 December 2021 [151]. In November 2021 and January 2022 the Claimant privately consulted Mr Chitnavis, a Consultant Neurosurgeon. Whilst surgery was initially discussed, Mr Chitnavis later advised against it due to the seriousness of back surgery and the Claimant's improving condition.
- 28 The Claimant was able to travel to Dubai for a holiday in December 2021, although he did experience a flare up of his back pain whilst on holiday.
- 29 Following his return to work in February 2022, the Claimant did not seek further advice or treatment from his GP about his symptoms of pain. The Claimant was deemed fully fit for firefighting duties from 16 March 2022. The Claimant was not on prescription painkilling medication at this time and took over the counter medication, paracetamol and ibuprofen, when required. In reaching this conclusion, I referred to the GP's letter of 12 October 2022, which includes the heading 'current repeat medication', but does not list any such medications. The Claimant also said in his oral evidence that he took paracetamol and ibuprofen when necessary.
- 30 For the avoidance of doubt, whilst the Claimant referred in his Disability Impact Statement to '*getting*' some Diazepam and Pregabalin medication, I do not find that he was taking either of these prescription medications during 2022 and 2023. I have not received any documentary evidence confirming that the Claimant was taking this or detailed evidence from the Claimant himself as to the dates when these medications were given to him, who prescribed them and in what circumstances.
- 31 In addition to being back to full duties from March 2022 and not taking prescription pain killing medication, a further indication of the extent of any symptoms of chronic pain at this time is given in the Occupational Health records. The Claimant confirmed that the record was accurate when it described the situation as follows,

'Since returning to operational duties FF Knuckey reports a continued progression in his back condition and no issues with FD.' [260]

- 32 The Claimant was also going out socially, for example, meeting friends and going to the pub.
- 33 The Claimant gave evidence about receiving some massage therapy from providers including Swanley Osteopaths and Bexley Sports Massage. The documentary evidence referred to some sessions in December 2023 and 2024. Whilst I accept this evidence, I do not find that the Claimant attended for such treatment in 2022 and January 2023. There was no detailed evidence from the Claimant on this and no documentary evidence provided in support.
- 34 On 21 June 2022 the Claimant underwent a routine periodic medical. Following this, his urine sample tested positive for cocaine metabolites.
- 35 With regards to the Claimant's mental health, the evidence provided identifies some psychological symptoms noted as being related to the road traffic accident in 2017 [205]. On balance, I am satisfied that whilst the Claimant did experience some minor mental health symptoms prior to 2022, they did not interfere with the Claimant's ability to work and undertake normal day to day activities.
- 36 This finding was supported by the Claimant's oral evidence that he was unable to give any timeframe as to when his mental health began to have an impact on his life and also there being no evidence that he consulted his GP about any mental health issues prior to 2022, save for one occasion in June 2019 when he reported an anger reaction, and there is no note in the GP records linking any physical issues to mental ill health. I considered that if the Claimant's mental health symptoms had made a noticeable impact upon his daily life, it was likely that the Claimant would be able to recall this when giving evidence.
- 37 The Claimant received some talking therapy from July 2019 from Wendy Ambrose, Counsellor / Psychotherapist and Clinical Supervisor. In her letter, dated 17 September 2022 and revised on 22 May 2024, Ms Ambrose confirms that the Claimant received some talking therapy from 2019 although there was a break in attendance in 2020 due to the pandemic. I am satisfied that the Claimant has attended 19 sessions from July 2019 until May 2024 and that this fact is confirmed in the text from Ms Ambrose contained in the revised letter. Accordingly, the Claimant has attended a few sessions each year during the years 2019 - 2024 (save for the height of the pandemic). Ms Ambrose refers to the success of the therapy and the 'positive change' in the Claimant's mental health.

- 38 The Claimant was diagnosed with Severe Anxiety and Depression in July 2022 and was prescribed Sertraline on 12 July 2022 [144]. He was given 21 tablets, which were expected at 1 tablet per day, to last for 3 weeks.
- 39 In the letter of 12 October 2022, Dr Suresh states that the Claimant had been suffering from *'these symptoms for several months prior to this'* [144].
- 40 In his oral evidence, the Claimant confirmed that he felt *'spaced out'* on the medication as reported at the consultation on 27 July 2022. Accordingly, he halved his dosage and then stopped taking the tablets altogether. I accepted the Claimant's evidence that he had definitely stopped the medication by October 2022.
- 41 The Claimant did not seek further medical attention for any mental health symptoms from approximately September / October 2022.
- 42 In support of his mental wellbeing, the Claimant also meditates with the support of an app, Headspace. He has been a member of the Headspace app since 15 July 2019 and the screenshot provided states that he has completed 709 sessions. The Claimant has also purchased a number of self help books about mindset, mental resilience and addressing anger issues.
- 43 On 7 October 2022 the Respondent held a Stage 3 disciplinary hearing. At its conclusion, the Claimant was summarily dismissed for gross misconduct.
- 44 Shortly after Christmas 2022, Mr O'Sullivan posted on Facebook that he was looking for work. The Claimant responded to Mr O'Sullivan in December 2022 and asked Mr O'Sullivan to work with him on flat roofing jobs. I accept the evidence set out in the document said to be a witness statement from Mr O'Sullivan, dated 21 May 2024, that Mr O'Sullivan and the Claimant worked together to *'build'* the business.
- 45 I am satisfied that the Claimant contacted Mr O'Sullivan because at that time, after Christmas 2022, the Claimant was actively working in his roofing business and he required additional labour. Whilst in Mr O'Sullivan's statement, various difficulties are described as being experienced by the Claimant, when the Claimant was asked about these matters he accepted that Mr O'Sullivan could be describing how things are this year rather than in 2022 and early 2023.
- 46 I am satisfied that the Claimant experienced symptoms of anxiety and depression during 2022. For a short period, following his suspension, these symptoms intensified and the Claimant sought support from his GP and tried medication. By October 2022 the Claimant was not taking medication or consulting his GP. His mood had improved and, as stated above, he continued to run his roofing business.

47 Following an appeal hearing on 17 January 2023, the Respondent upheld the decision to dismiss the Claimant.

Legal Summary

48 Pursuant to Section 6(1) of the Equality Act 2010, a person has a disability if he has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. This definition is elaborated on and extended by Schedule 1 of the Act and by the Equality Act 2010 (Disability) Regulations 2010.

49 It is for a claimant to show to the Tribunal that he meets the criteria of being a disabled person.

50 In *Chacón Navas v Eurest Colectividades SA* [2006] IRLR 706, 'disability' was held to cover those who have a 'limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life'. This definition was approved in *HK Danmark, acting on behalf of Ring v Dansk almennyttigt Boligselskab* [2013] IRLR 571.

51 In assessing whether the disability has a substantial effect, the focus of the tribunal should be on what the Claimant cannot do, not on what they can do (*Aderemi v London and South Eastern Railway Ltd* [2013] ICR 591). Where some level of impairment is established, the question for the tribunal is whether the adverse effects of the impairments were "substantial" (Equality Act 2010 section 6(1)), where "substantial" means more than minor or trivial (section 212(1)). In *Aderemi, Langstaff P* provided the following summary,

"It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a Tribunal has to consider is an adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other'." (paragraph 14, p 591)

- 52 One aspect of considering whether an impact on day to day activities is “substantial” is to compare the difference in how the individual carries out those activities because of the condition(s) relied on, using his coping mechanisms, albeit without any medication or aids: “If the difference is more than the kind of difference one might expect taking a cross-section of the population, then the effects are substantial.”(Paterson v Commission for Police for the Metropolis [2007] ICR 15523 (paragraph 68)).
- 53 The simple fact that a claimant can only carry out normal day-to-day activities with difficulty or with pain does not establish that disability is made out. As pointed out in Condappa v Newham Healthcare Trust [2001] All ER (D) 38 (Dec), the Act is concerned not with any adverse effect but rather with a substantial adverse effect. Whether or not pain or difficulty is sufficient in any particular case is a matter for the tribunal to decide on the facts before it.
- 54 If a medical report expresses an opinion on whether a claimant meets the legal test for disability, that is not conclusive. The issue is a matter of fact for the tribunal to decide (Vicary v British Telecommunications [1999] IRLR 680, see also Abadeh v British Telecommunications Plc [2001] IRLR 23).
- 55 The relevant time to consider whether a person was disabled is the date of the alleged discrimination (McDougall v Richmond Adult Community College [2008] IRLR 227). It is necessary to assess whether, at the time of the act (i.e. on the evidence available at that time) the individual had suffered a substantial effect for a year or more, or – on the evidence at that particular time – was more likely than not to suffer substantial effect(s) for a total of a year or more (Tesco Stores Ltd v Tennant [2020] IRLR 363). In answering the question of whether the effects are, at a certain point in time “likely to last a year or more”, the tribunal must interpret “likely” as meaning “it could well happen” SCA Packaging Limited v Boyle [2009] ICR 1056.

Tribunal’s Conclusions

- 56 In reaching my conclusions I have considered the entirety of the evidence I have heard and seen. I have also taken into account the Respondent’s written submissions and the closing oral submissions from both parties.
- 57 I am required to consider whether, at the relevant time from 21 June 2022 to 17 January 2023, the Claimant was disabled as defined in Section 6 of the Equality Act 2010. The Claimant bears the burden of establishing that he was disabled at all relevant times.
- 58 I accept that the Claimant had a physical impairment throughout the relevant time period. As stated in my findings of fact, this impairment was chronic pain. It led to his absence from work in 2017, 2018 and

2021 - 2022. I am satisfied that this amounted to a physical impairment at the relevant time for the purposes of the statutory definition.

59 I am also satisfied that the Claimant had a mental impairment throughout the relevant time period, namely anxiety and depression. I have based this conclusion upon the evidence contained in the GP's letter of 12 October 2022, the GP records which show relevant consultations in the summer of 2022, the evidence from Wendy Ambrose and the Claimant's oral evidence confirming the documentary evidence referred to.

60 I next turn to whether either or both of the impairments had an effect on the Claimant's ability to carry out normal day-to-day activities at the relevant time.

Physical Impairment – Chronic Pain

61 I am not satisfied on the evidence provided that during the relevant period of June 2022 - January 2023, the Claimant was adversely effected in his ability to carry out normal day to day activities by his physical impairment.

62 As set out in the legal summary, the focus should be on what the Claimant cannot do. However there was very little detailed evidence presented by the Claimant on this issue. The Claimant's evidence is that he lived on his own, worked in both of his chosen occupations and went out socially. He was restricted in pursuing some activities in the gym and playing rugby to his pre-accident level. For his physical pain, the Claimant was taking paracetamol and ibuprofen tablets when required.

63 I have concluded that, on balance, the Claimant was not adversely effected in his ability to carry out normal day to day activities by reason of his physical impairment. This conclusion is supported by the fact that he was physically able to work as a firefighter and a roofer. It is therefore unlikely that he would have been physically impaired in day to day activities. He had a good level of physical fitness that enabled him, on the balance of probabilities, to carry out normal day to day activities without an adverse effect as required by Section 6 of the Equality Act 2010. Further, as stated, the Claimant has not provided detailed evidence of particular functional limitations.

64 Even if I am mistaken on this matter, I am satisfied that any adverse effect he experienced would not have been 'substantial'.

65 In reaching these conclusions I have referred to the following matters:

65.1 The medical evidence confirms the Claimant was not being actively treated by any doctor for his pain during the relevant time period;

- 65.2 As expressly confirmed by the Claimant in his oral evidence, the occupational health records confirming no issues with his physical work at this time, were entirely correct.
- 65.3 The Claimant was also able to carry out his roofing work throughout the relevant time period. He was able to socialise with friends and plan and travel on a holiday to Dubai in December 2022.
- 66 On the evidence presented, whilst the Claimant had some back pain, I am not satisfied that this caused an adverse effect on the Claimant's ability to undertake day to day activities and, even if it did cause an adverse effect, I am not satisfied that that effect was substantial. The fact that a claimant can experience some pain when carrying out normal day-to-day activities on some occasions during the relevant period does not, by itself, establish that disability is made out.

Mental Impairment – Anxiety and Depression

- 67 As stated above, I have accepted that the Claimant had a mental impairment and, following this conclusion, I must decide whether this impairment had a substantial and long term adverse effect on the Claimant's ability to carry out normal day-to-day activities.
- 68 Having reviewed the entirety of the evidence presented, I have decided that, it is more likely than not, that the symptoms of anxiety and depression did not cause an adverse effect on the Claimant's ability to carry out normal day to day activities. Again, I am satisfied that even if it did, no such adverse effect was substantial and long-term.
- 69 In reaching these conclusions, I have taken into account the following matters:
- 69.1 The Claimant bears the burden of establishing that he was disabled and his evidence, including his Disability Impact Statement, fails to provide cogent and full evidence of the impact said to have been caused by this impairment.
- 69.2 Whilst the Claimant suffered from anxiety and depression during the relevant time period, there is no further evidence in support of the extent of the symptoms experienced and their impact upon the Claimant. For example, within the medical evidence there is no information about any diagnostic tests carried out to assist with diagnosing the extent of the mental health complaints.
- 69.3 The Claimant had some occasional talking therapy with Ms Ambrose and, following his suspension was prescribed 21 tablets of anti-depressant medication in July 2022. He did not continue to take this medication as prescribed and by August 2022 it was reported that there had been lots of improvement and his mood was stable [141].

The Claimant did not raise any mental health issues when seen by Occupational Health.

- 69.4 There is a lack of contemporaneous evidence as to the extent of the Claimant's difficulties during the relevant period. As noted above he was able to work as a firefighter until his suspension and he continued working as a self-employed roofer beyond this. He was able to socialise with friends and go on holiday in December 2022.
- 70 I am not satisfied that the Claimant has established by way of examples any adverse effects on his ability to carry out normal day-to-day activities, and that these effects were substantial. During the majority of the relevant time period, the Claimant was having no treatment for his mental health symptoms other than occasional talking therapy.
- 71 In my judgment the Claimant was not disabled at the relevant time. Whilst the Claimant had both a physical and mental impairment, those impairments did not cause an adverse effect on his ability to carry out normal day-to-day activities. Accordingly Section 6 of the Equality Act 2010 is not satisfied and the Claimant's claims of disability discrimination shall not proceed. For the avoidance of doubt, this includes the Claimant's claim under Section 15 of the Equality Act 2010. As stated above, the Claimant has not established that he was disabled for the purposes of the 2010 Act at the relevant time and he is unable to rely in any further way on the relevant misconduct to continue with this disability discrimination claim.

Case Management Directions

- 72 The full merits hearing is listed to take place on **25 – 28 June 2024**, as already notified to the parties.
- 73 Due to the proximity of the final hearing, a finalised paginated hearing bundle shall be filed and served no later than **4pm on Thursday 6 June 2024**.
- 74 The parties shall exchange witness statements no later than **4pm on 10 June 2024**.

Employment Judge Harrington
3 June 2024

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