EMPLOYMENT TRIBUNALS

Claimant: Miss A Parker

Respondent: British Telecommunications plc

Heard at: **Bristol** **On:** **21 August 2024**

Before: **Employment Judge Livesey**

Representation:
Claimant: Miss C Fairbank, lay representative
Respondent: Ms Jervis, BT advocate

JUDGMENT

The Claimant was disabled by virtue of depression and anxiety at the material time.

REASONS

1. Relevant background

1.1 By a claim form dated 18 November 2023, the Claimant brought complaints of unfair dismissal and discrimination on the grounds of disability. The Claimant had worked for the Respondent between August 2022 and December 2023 as an Account Manager. She was dismissed as a result of poor attendance and her sickness record.

1.2 The Claimant's complaint of unfair dismissal was dismissed on 1 May 2024 by Employment Judge Bax as she did not have sufficient service to pursue such a claim. The remaining claims were then discussed before Employment Judge Midgley on 22 May 2024 when he conducted a Case Management to Preliminary Hearing.

1.3 Although the Claimant had ticked box 12 on the Claim Form to say that she was not disabled, she identified the following disabilities that she relied upon in support of her discrimination claims;
(i) Post Traumatic Stress Disorder ('PTSD');
(ii) Anxiety and depression;
(iii) Patella dislocation;
(iv) Supra Ventricular Tachycardia ('SVT');

(v) Vasovagal syncope.

1.4 The Judge was able to discuss the issues with the parties and they were agreed and recorded in the Case Summary which accompanied the Order. It was important to note that the physical disabilities relied upon were said to have impacted upon her because they increased her low mood which had been the cause of her sickness absence. This hearing was listed in order to determine the issue of disability, but the case was also listed for a final hearing for three days in January 2025.

1.5 The Respondent's position on disability was set out in its emails of 9 May and 10 June 2024; they were disputed. In a more detailed email of 16 July 2024, it's position was stated with greater clarity;

- Depression, anxiety and/or PTSD; denied in the absence of any evidence supporting such an impairment;
- SVT; although there was evidence of the presence of such a condition, there was no evidence of any adverse impact upon the Claimant's day-to-day activities;
- Vasovagal syncope; again, although there was evidence of the presence of such a condition, there was no evidence about adverse impact and/or whether the condition was long-term;
- Patella dislocation; the Respondent accepted the presence of evidence that the condition existed in 2014, but it continued to deny that it was a disability in the absence of any evidence as to day-to-day impact, either then or subsequently.

2. Evidence

2.1 A bundle of documents was produced, pages to which have been referred to hereafter in square brackets. At the start of the hearing, there was some dispute as to its contents the following evidence which had not been disclosed in accordance with case management directions;

(i) A further disability impact statement, with attachments (an earlier statement had been disclosed on 7 May 2024) [77-85];

(ii) A letter from her GP (Dr Pond) dated 16 August 2024 [86].

2.2 Whilst the Respondent did not seek to have (ii) excluded, Ms Jervis did object to the second impact statement which it had been served, since it appeared to have been an attempt to remedy evidential holes which the Respondent had identified when it clarified its position on disability. If the statement was admitted, however, Ms Jervis would not have sought a postponement.

2.3 I considered that, in the absence of any direction in relation to the filing of further witness evidence, the late statement was not served in breach of the Case Management Order. It did cause the Respondent some evidential prejudice in the sense that its contents improved the Claimant's case, but it was not something that it wanted to (or could) do anything about. On balance, the evidence was admitted in order to give the fullest possible picture of the position.

2.4 All of the Claimant's documentary evidence on disability was supposed to have been disclosed on or before 3 July in accordance with paragraph 29 of the Case Management Order of 31 May, including her GP records, which

were not been disclosed. The Respondent demonstrated how easy it would have been for the Claimant to access her records (the webpages indicating the route to access were produced [87-90]).

2.5 The Claimant accepted that she had accessed her prescription records on line and could have (but did not) access her medical records. She stated that she had been told that there were errors in them and had been advised not to rely on them and apologised for her failure to comply with the Order. That was unsatisfactory; incomplete or slightly inaccurate records ought to have been better than no records at all.

2.6 As it was, however, neither party sought a postponement to enable the records to have been produced. They wanted to proceed on the basis of the evidence that was before me. We therefore did so.

2.7 The Claimant therefore gave evidence in support of her contention that she had been disabled at all material times in accordance with the two impact statements upon which she was cross-examined. The factual findings set out below were reached on the balance of probabilities.

2.8 As stated in paragraph 1.4 above, although the Claimant's physical conditions may or may not have amounted to disabilities in their own right, their relevance was that they had served to heighten or exacerbate the effects of the mental impairments that were relied upon (PTSD and/or anxiety and depression). That was clear from paragraph 2 of the Case Summary of 22 May 2024 and the position was confirmed by the contents of paragraph 8 of the Amended Response; all of the fit notes which had been supplied in relation to her absences had referred to 'low mood' or 'stress'. It was, accordingly, those mental impairments upon which I focused for the purposes of determining the issue of disability [66-7].

2.9 When the Claimant gave evidence, she described the daily effects of her mental impairments; she said that "*every day*" was "*a mix of emotional exhaustion and mental overload, where even simple tasks, such as getting out of bed, showering and dressing can become completely overwhelming*" [77]. In her first statement, she said as follows [64];

> "*My mental health affects numerous aspects of my daily life including struggling with low mood, poor concentration, wavering motivation, low social battery, irritability. When in a depressive episode, the effort required to present as 'normal' is enormous and massively taxing and some days I don't have the capacity to get dressed or leave the house. Outside of work, I find myself cancelling social engagements/activities at very short notice or arriving late due to the daily struggles I face.*"

2.10 She described the impact upon her work as follows [77];

> "*When I have been in a work environment at BT, my PTSD, depression and anxiety can turn a regular workday into a significant challenge. The PTSD triggers, like sudden noises or certain interactions with people within the office, can cause intense stress, making it hard to concentrate or stay calm…. When I am experiencing heightened periods of depression and struggle to find the motivation and energy, it makes tasks that once seemed routine feel overwhelming and difficult to complete e.g., getting myself to the office where I will be surrounded by people, noise, distractions and the environment that I didn't feel safe in.*"

2.11 Those were significant and intrusive symptoms and they were not explored in detail or directly challenged in cross examination by Ms Jervis. I had no real reason to gainsay that evidence, although I did have the feeling that they may have been overplayed a little.

2.12 Ms Jervis did suggest to her that there had been occasions when she had been absent from work but had nevertheless been able to join her team in a pub after the working day. The frequency of such occasions were not clear and the Claimant explained them on the basis that, because of the events which occurred there, her workplace became a trigger for her symptoms and/or that mornings for her were worse and/or that she still felt a strong need to socialise with her team as much a s possible, since she was losing out on bonding with them by not having been at work. Again, although not a satisfactory piece of evidence from the Claimant's perspective, it was explained in a reasonable and coherent fashion.

2.13 Although the Claimant did not disclose her GP records, as stated above, she did set out specific dates of relevance from them in her first statement [63]. Those of relevance included her first counselling session for depression (10 October 2014), the date of the prescription of Sertraline (15 May 2020) and of Propranolol (31 August 2021).

2.14 Further, there was a recent piece of correspondence from her doctor dated 16 August 2024 which contained the following important paragraph in relation to her mental impairments [86];

"*Amelia also has a diagnosis of mixed depression and anxiety for which she takes Sertraline which is an anti-anxiety and anti-depression medication. Amelia's depression was diagnosed around the age of 16 and this has been treated with medication and talking therapies and some Propranolol which is a medication to treat the physical symptoms of anxiety."*

2.15 The Claimant stated in evidence that she still takes Sertraline (200 mg/day) and Propranolol as and when it is needed, since it is used to treat panic attacks directly. She further said this [78];

"*Taking antidepressants can be extremely beneficial, offering relief from the overwhelming symptoms of depression and anxiety by helping to stabilise mood and improve daily functioning.*"

2.16 Taking the two mental impairments first, PTSD and depression and anxiety, whilst there was reasonably supportive evidence in relation to the existence and effects of the latter, there was little objective evidence of the former; it did not feature in Dr Pond's letter or any of the quoted GP entries within the Claimant's first impact statement. The Claimant stated that it had been diagnosed by a therapist, although she did not who or when.

2.17 As to the impact and/or relevance of the physical impairments, there was clear medical evidence supporting the fact that the Claimant had suffered bilateral patella dislocations since her teenage years (see Mr Close's letter of 5 March 2014 [68], which referred to her then becoming '*increasingly disabled*' by the problem) and she stated that the condition exacerbated her depression and/or anxiety [78].

2.18 Similarly, there was documentation which confirmed the existence of recurrent syncopal (fainting) episodes, which were caused and/or contributed to by the SVT, and which appeared to have started in July 2018 (see Dr Ginks' letter [70] and the Note from Sent Bartholomew's Medical Centre of 25 January 2019 [73]). The symptoms described by her at the time were defined as a "*classical description of vasovagal syncope*". She was provided with medication for the condition in May 2019 [71-2]. The Claimant accepted that there was no evidence of any continuing SVT/cardiac issues since 2022 [86] but, equally, there was no evidence that it had resolved. She understood that it was a lifelong condition and the medical documentation certainly did not suggest otherwise.

3. Legal principles

3.1 A person has a disability if she has a physical or mental impairment which has a substantial and long-term adverse effect on her ability to carry out normal day to day activities (s. 6 of the Equality Act). These questions may overlap to a certain degree. However, the Tribunal had to ensure that each step was considered separately and sequentially (*J v DLA Piper* [2010] ICR 1052, and *Goodwin v Patent Office* [1999] ICR 302).

3.2 The burden was on the Claimant to prove the four conditions (*Kapadia v London Borough of Lambeth* [2000] IRLR 699 (CA)). Schedule 1 of the Act contained further guidance in relation to the definition. In addition, I took into account the '*Guidance on the Definition of Disability*' which I was required to where relevant under Schedule 1, Part 1, paragraph 12.

3.3 In *Goodwin-v-Patent Office* [1999] IRLR 4, the EAT gave detailed guidance as to the approach which ought to have been taken in determining the issue of disability. A purposive approach to the legislation was required and I had to remember that, just because a person could undertake day-to-day activities with difficulty, that did not mean that there was no substantial impairment. The focus ought to have been on what the Claimant could not have done or could only have done with difficulty. The effect of medication ought to have been ignored for the purposes of the assessment. The approach in *Goodwin* was approved in *J-v-DLA Piper UK LLP* [2010] ICR 1052, at paragraph 40. It was said at paragraph 38;

> "*There are indeed sometimes cases where identifying the nature of the impairment from which a Claimant may be suffering involves difficult medical questions; and we agree that in many or most such cases it will be easier – and is entirely legitimate – for the tribunal to park that issue and to ask first whether the Claimant's ability to carry out normal day-to-day activities has been adversely affected – one might indeed say "impaired" – on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the Claimant is suffering from a condition which has produced that adverse effect — in other words, an "impairment". If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve difficult medical issues of the kind to which we have referred."*

3.4 Whether someone had an impairment was a question of fact and the word had to be given its ordinary meaning. Its cause was likely to have been irrelevant;

"*Impairment for this purpose and in this context, has in our judgment to mean some damage, defect, disorder or disease compared with a person having a full set of physical and mental equipment in normal condition. The phrase 'physical or mental impairment' refers to a person having (in everyday language) something wrong with them physically, or something wrong with them mentally.*" (*Rugamer-v-Sony Music Entertainment UK Ltd* [2001] IRLR 664).

3.5 For activities to have been normal day-to-day activities, they must have been normal in the following sense;

"In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities." (Paragraph D3 of the *Guidance*)

3.6 There needed to have been a substantial effect upon those activities with the statutory definition being "*more than minor or trivial*" (s. 212 (1)). Section B1 of the *Guidance* stated that "*the requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people*". Factors that illustrated substantiality within the *Guidelines* included: the time taken to carry out an activity; the way in which an activity is carried out; and the effects of environment. The *Guidelines*, however, ought only to have been considered if the answer could not have been found from a simple application of the statute (*Elliott-v-Dorset County Council* UKEAT/0197/20).

3.7 An impairment will be treated as having had a substantial adverse effect if (i) measures were being taken to treat it or correct it and (ii) but for the measures, the impairment would have been likely to have had that effect.

3.8 It was clear from paragraph 2 of Schedule 1 of the Act that an impairment was long term if it had lasted for 12 months or more, or was likely to have lasted that long or for the rest of the life of the Claimant. All three possibilities had to be considered (*McKechnie Plastic Components-v-Grant* UKEAT/0284/08). As to the question of likelihood, the Tribunal had to determine whether it 'could well happen' (*Guidance*, paragraph C3 and *SCA Packaging Ltd-v-Boyle* [2009] IRLR 746).

3.9 The *Guidance* indicated that conditions with effects which recurred only sporadically or for short periods could still qualify as long term impairments for the purposes of the Act if the effects on normal day to day activities were substantial and were likely to have recurred beyond 12 months after the first occurrence. The *Guidance* provided examples within paragraphs C5 and 6. It further stated that it was not necessary for the effect to have been the same throughout the period which was being considered (C7). It set out what should have been considered in relation to the likelihood of recurrence; essentially, it required all of the circumstances to have been taken into account, including the way in which the person could have controlled or coped with the effects of the impairment, which may not always have been successful (C10).

3.10 Medical treatment may have permanently removed the impairment so that the recurrence of its effects would have then been unlikely even with no further treatment. However, if the treatment simply delayed or prevented a recurrence, and a recurrence was likely if the treatment stopped, as was the case with most medication, then the treatment was to have been ignored and the effect was to have been regarded as having been likely to recur (C11).

3.11 In cases involving mental impairments, the use of terms such as 'anxiety', 'stress' or 'depression', even by GPs, would not necessarily amount to proof of an impairment, even if such terms, or similar, had been referred to as part of one of the World Health Organisation International Classification of Diseases (*Morgan-v-Staffordshire University* [2002] IRLR 190 and *J-v-DLA Piper UK LLP* [2010] IRLR 936). The EAT said, at paragraph 42 and 43 of *J-v-DLA Piper*:

> ***"****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.*
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> *43. We should make it clear that the distinction discussed in the preceding paragraph does not involve the restoration of the requirement previously imposed by paragraph 1(1) of Schedule 1 that the Claimant prove that he or she is suffering from a "clinically well recognised illness";…"*

3.12 The EAT in *Morgan* underlined the need for a claimant to prove his or her

case on disability; tribunals were not expected to have had anything more than a layman's rudimentary familiarity with mental impairments or psychiatric classifications. The use of labels such as 'anxiety', 'stress' or 'depression' would not normally suffice unless there was credible and informed evidence that, in the particular circumstances, so loose a description nevertheless identified an illness or condition which caused the substantial impairment required under the statute. The EAT recognised that there were significant dangers of a tribunal forming a view on the presence of a mental impairment solely from the manner in which a claimant gave evidence on the day of the hearing.

3.13 Paragraph 55 of the decision in *Royal Bank of Scotland plc-v-Morris* UKEAT/0436/10 was also relevant:

"*The burden of proving disability lies on the Claimant. There is no rule of law that that burden can only be discharged by adducing first-hand expert evidence, but difficult questions frequently arise in relation to mental impairment, and in* Morgan v Staffordshire University *[2002] ICR 475 this Tribunal, Lindsay P presiding, observed that "the existence or not of a mental impairment is very much a matter for qualified and informed medical opinion" (see para. 20 (5), at p. 485 A-B); and it was held in that case that reference to the applicant's GP notes was insufficient to establish that she was suffering from a disabling depression (see in particular paras. 18-20, at pp. 482-4). (We should acknowledge that at the time that* Morgan *was decided paragraph 1 of Schedule 1 contained a provision relevant to mental impairment which has since been repealed; but it does not seem to us that Lindsay P's observations were specifically related to that point.)*"

3.14 Nevertheless, it was not always possible or necessary to label a condition, or collection of conditions. The statutory language always had to be borne in mind; if the condition caused an impairment which was more than minor or trivial, however it had been labelled, that would ordinarily suffice. Appendix 1 to the EHRC Code of Practice of Employment stated that there was no need for a person to establish a medically diagnosed cause for their impairment. What was important to consider was the effect of the impairment and not the cause.

3.15 In the case of mental impairments, however, the value of informed medical evidence was not to have been underestimated (see *Ministry of Defence-v-Hay* [2008] ICR 1247). Nevertheless, where there was no evidence that demonstrated that an employee was suffering from a disability at the time the alleged act of discrimination occurred, a tribunal was entitled to consider evidence of disability more generally and to infer from that evidence that the disability existed at the relevant time (*All Answers Ltd-v-Wain and another* UKEAT/00232/20/AT).

3.16 In cases where an employee blamed her work situation for the cause of their stress, the case of *Herry-v-Dudley Metropolitan Council and Governing Body of Hillcrest School* [2017] ICR 610, was of assistance in which the EAT expanded upon the distinction drawn in *J-v-DLA Piper* and made the following observations:

(a) There was a class of case where the individual would not give way or compromise over an issue at work, and refused to return to work, yet

in other respects suffered no or little apparent adverse effect on normal day-to-day activities;

(b) A doctor may have been more likely to have referred to the presentation of such an entrenched position as "*stress*" than as anxiety or depression;

(c) An employment tribunal was not bound to find that there was a mental impairment for the purposes of disability in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise, were not of themselves mental impairments: they may simply have reflected a person's character or personality;

(d) Any medical evidence put before the tribunal that supported a diagnosis of a mental impairment must have been considered with great care, as must any evidence of adverse effect over and above an unwillingness to have returned to work until an issue was resolved to the employee's satisfaction; but in the end the question of whether there was a mental impairment was one for the employment tribunal to assess.

3.17 The time at which to assess disability was the date of the alleged discriminatory acts (*Richmond Adult Community College-v-McDougall* [2008] ICR 431, at paragraph 24 and *Cruickshank-v-VAW Motorcast Ltd* [2002] ICR 729, EAT).

4. Conclusions

4.1 The Claimant had a long-term mental health condition, defined as mixed depression and anxiety in Dr Pond's letter of 16 August 2024, for which she was in receipt of medication and had received therapy. That condition was present throughout her employment. It clearly waxed and waned in severity but, in my judgment, it constituted a disability for the purposes of the Act.

4.2 It could have been viewed in two ways; either, it could have been regarded as extant since 2014 when it was first diagnosed, but its effects were controlled through the prescribed medication. It was reasonable to consider that the prescribed medication as having the effect of preventing yet more debilitating symptoms from surfacing in light of the Claimant's evidence. Alternatively, it could have been understood as a condition which ebbed and flowed but, during periods of hiatus, there remained the likelihood of recurrence, such that the condition constituted a disability throughout.

4.3 The severity of its impact, as described in the Claimant's evidence, was such as to have constituted a substantial impairment in the Claimant's normal day-to-day activities. She had prolonged periods of certified sickness absence from work.

4.4 There was, however, no compelling evidence in relation to the further asserted condition of PTSD and its existence had been proved. There was no evidence of a clinical diagnosis (typically, in my experience, following a series of tests, not undertaken by a therapist), no evidence of a cause or a prognosis.

4.5 It was not difficult to appreciate how the effects of the Claimant's physical conditions fed into her depression and magnified symptoms that she experienced but no findings in relation to them were necessary for the

reasons already explained.

4.6 Nothing in these Reasons should be taken to indicate that I found that the Claimant necessarily suffered any substantial disadvantage as a result of her disability and/or whether the claimed discrimination necessarily arose from her disability. It was not part of my task to make such findings. The Claimant will need to prove those things as part of her case and she ought to comply with the case management direction and obtain her GP records in order to do so, albeit at this late stage.

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Employment Judge Livesey

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Date 21 August 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

11 September 2024

Jade Lobb
FOR THE TRIBUNAL OFFICE