EMPLOYMENT TRIBUNALS

Claimant ***Respondent***

Mr M Cruz **v** **Ladbrokes Betting and Gaming Limited**

PUBLIC PRELIMINARY HEARING

HELD AT: **London Central** **ON:** **13 February 2025**

BEFORE: **Employment Judge Brown (Sitting alone)**

Representation:

For Claimant: **In person**
For Respondents: **Mr G Deane, Counsel**

JUDGMENT

The Judgment of the Tribunal is that:

> **The Claimant was not a disabled person by reason of stroke, depression, anxiety or low mood, or other physical or mental impairment, at any time from 11 May 2022 – 22 February 2024.**

REASONS

1. This hearing was listed to decide:

    a. Whether the claimant was disabled within the meaning of the Equality Act at the relevant time.

2. The Claimant presented his claim on 6 April 2024. He brings complaints against the Respondent, including disability discrimination complaints, as follows:

a. (added by way of amendment at a hearing on 31 October 2024) direct disability discrimination in respect of:
    i. Dismissal; and
    ii. Refusal of request for fit note made on 12 January 2024;
b. Discrimination arising from disability (s. 15 Equality Act 2010 ("EqA"):
    i. with respect to Dismissal;
c. Failure to make reasonable adjustments (ss. 20, 21 EqA) with respect to:
    i. Failure to allow the claimant to work from a betting shop closer to his home;
    ii. Failure to procure a chair with elevated arm rests.

3. At the start of the hearing, I asked for the dates of these alleged acts. The parties agree that the Claimant was dismissed 22 February 2024. In the claim form, the Claimant said that he was injured in work on 11 May 2022. He told me today that he first asked to be transferred to another shop after that injury in May 2022. He told me that he did not require a chair with raised arm rests before May 2022.

4. The "relevant time" for the purpose of the Claimant's claims was therefore 11 May 2022 – 22 February 2024.

5. The Claimant relies on the following impairments in contending that he was a disabled person at the relevant times: Depression, Anxiety, Low mood, and Stroke.

6. In preparation for this hearing, the Claimant was ordered to provide a disability impact statement and his GP notes.

7. He sent a document to the Tribunal and the Respondent on the 29 August 2024 a document entitled 'Application to amend ET1'. At part 7, he gave some information about his disability.

8. The Claimant provided a copy of his GP records on 3 January 2025.

9. The Claimant's Occupational Heath records are available.

10. The Claimant sent a further email on 18 January 2025 stating what he contends are the effects of his disability.

11. The Respondent disputes that the Claimant had a stroke at all. It accepts that, from around October / November 2024, the Claimant had a disability by reason of the mental impairment of depression, but it does not accept that he was disabled at the relevant time because of depression, anxiety or low mood.

12. I heard evidence from the Claimant in relation to disability. He confirmed the contents of his 29 August 2024 and 18 January 2025 emails. There was a Bundle of documents containing medical records and notes. The Claimant gave me a list of page numbers from the bundle of medical notes, on which he relied as evidence. I read all these. I was sent an additional page of medical evidence which was not in the bundle, dated 23 October 2023, which I read.

13. Both parties made submissions.

Disability Law

14. In coming to my decision, I took account of the following relevant law.

15. By *s6 Equality Act 2010*, 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.

16. The burden of proof is on the Claimant to show that he or she satisfies this definition.

17. *Sch 1 para 12 EqA 2010* provides that, in determining whether a person has a disability, an adjudicating body (which includes an Employment Tribunal) must take into account such Guidance as it thinks is relevant. The relevant Guidance to be taken into account in this case is Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability (2011), brought into effect on 1 May 2011.

18. Whether there is an impairment which has a substantial effect on normal day to day activities is to be assessed at the date of the alleged discriminatory act, *Cruickshanks v VAW Motorcrest Limited* [2002] ICR 729, EAT.

19. *Goodwin v Post Office* [1999] ICR 302 established that the words of the *s1 DDA 1995,* which reflect the words of *s6 EqA,* require the ET to look at the evidence regarding disability by reference to 4 different conditions:

a. Did the Claimant have a mental or physical impairment (the impairment condition)?
b. Did the impairment affect the Claimant's ability to carry out normal day to day activities? (the adverse effect condition)
c. Was the adverse effect substantial? (the substantial condition)
d. Was the adverse effect long term? (the long term condition).

Impairment

20. The EHRC Employment Code states that the Claimant need not show a medically diagnosed cause for their impairment, but that what is important is the effect of the condition, Appendix 1, para 7.

21. In *J v DLA Piper UK LLP* [2010] IRLR 936, [2010] ICR 1052. The EAT said that it would be legitimate for the Tribunal to consider, first, whether there has been a long-term adverse effect on normal day-to-day activities and then decide whether there is an impairment.

22. However, although the absence of an apparent cause for an impairment may not have legal significance, it may be evidentially significant: *Walker v SITA Information Networking Computing Ltd* [2013] CLY 964, EAT *per* Langstaff J at [17].

Adverse Effect on Normal Day to Day Activities

23. Section D of the *2011 Guidance* gives guidance on adverse effects on normal day to day activities.

24. D3 states that day-to-day activities are things people do on a regular basis, examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food.., travelling by various forms of transport.

25. Normal day to day activities encompass activities both at home and activities relevant to participation in work, *Chacon Navas v Eurest Colectividades SA* [2006] IRLR 706; *Paterson v Metropolitan Police Commissioner* [2007] IRLR 763.

26. D22 states that an impairment may not directly **prevent** someone from carrying out one or more normal day to day activities, but it may still have a substantial adverse long term effect on how he carries out those activities, for example because of the pain or fatigue suffered.

27. The Tribunal should focus on what an individual *cannot do, or can only do with difficulty*, rather than on the things that he or she is able to do – Guidance para B9. *Goodwin v Patent Office* 1999 ICR 302, EAT stated that, even though the Claimant may be able to perform many activities, the impairment may still have a substantial adverse effect on other activities, so that the Claimant is properly to be regarded as a disabled person.

28. However, the focus ought not to be on the restrictions an individual voluntarily imposes on themselves due to beliefs about what might trigger their condition. An individual's subjective belief around activities they can/cannot perform is not sufficient to establish a causal connection between the impairment and the adverse effect: *Primaz v Carl Room Restaurants Ltd t/a McDonald's Restaurants Ltd* and others [2022] IRLR 194, EAT per Auerbach J at §71-73.

Substantial

29. A substantial effect is one which is more than minor or trivial*, s 212(1) EqA 2010*. Section B of the Guidance addresses "substantial" adverse effect.

30. Account should be taken of how far a person can **reasonably** be expected to modify their behaviour, for example by use of a coping or avoidance strategy, to reduce the effects of the impairment on normal day to day activities. Such a strategy might alter the effects of the impairment so that the person does not meet the definition of disability, Guidance para B7.

31. However, it would not be reasonable to expect a disabled person to give up normal day to day activities which exacerbate their symptoms, *Guidance B8.*

Long Term

32. The effect of an impairment is long term if, inter alia, it has lasted for at least 12 months, or at the relevant time, is likely to last for at least 12 months.

33. "Likely" means, "could well happen".

34. In assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time of the alleged discrimination. Anything occurring after that time is not relevant in assessing likelihood, Guidance para C4 and *Richmond Adult Community College v McDougall* [2008] ICR 431, CA.

Findings of Fact

35. The Claimant provided very little evidence in his documents sent to the Tribunal on 29 August 2024 and 17 January 2025 on his medical conditions and their effects on his ability to carry out day to day activities.

36. He relied mainly on the medical notes to establish his impairments and their effects on his ability to carry out day to day activities.

37. I agreed with the Respondent that the GP notes are not entirely clear. There are records of the Claimant attending hospital but discharging himself, and being referred for appointments but not attending them, making the history disjointed, as noted in the GP notes on 27 December 2023, Bundle p80.

38. The Claimant was employed from 17 May 2021 until he was dismissed on 22 February 2024. The Claimant was absent from work from 3 July 2023 until his dismissal. The Claimant submitted fit notes throughout this time that he was not fit for any work due to neurological symptoms under investigation, p135.

<u>Stroke</u>

39. It seems that the Claimant had a fall in work around 11 May 2022. He attended Ealing Hospital on 12 May 2022, giving a history of dizziness, double vision and vertigo. Some investigations were undertaken regarding a "head stroke" but CT scans of his head and spine were "unremarkable", p401. He was referred to the Stroke Team at Northwick Park Hospital and told that he should return to Ealing if Northwick Stroke team gave him the "all clear" regarding a stroke, p402.

40. The Claimant was then taken by blue light ambulance to hospital in the early hours of 13 May 2022, for a suspected stroke, p398. The diagnosis was "other nervous system disorder" and he was referred again to Northwick Park Hospital.

41. However, on 13 May 2022 his GP notes record, "seen at Ealing Hospital and reviewed at Northwick Park. No evidence of stroke and not medicated. … Has neck pain probably musculoskeletal but patient not willing to discuss." P97.

42. On 23 May 2022 the GP notes also record, "there is no stroke recorded… pt [patient] not happy with outcome", p95.

43. The Claimant visited his GP on a very regular basis throughout 20022 and 2023, complaining of dizziness and pain, pp80 – 95.

44. For example, the Claimant advised his GP on 9 October 2023 his symptoms were worsening as no treatments, p 83.

45. On 18 December 2023 the GP notes recorded the Claimant reported worsening symptoms such as stiffness in limbs and aches all over his body, p80.

46. On 28 December 2023 the GP notes recorded, "TIA has been ruled out and stroke unlikely as normal CT scan with symptoms across hemispheres", p80.

47. The Claimant stated in his ET1 that he had a fit note dated 12 January 2024 stating 'maybe fit for work'.

48. On 19 January 2024, the Occupational Health doctor, Dr Fisher, reported, "I do not think that his symptoms are in keeping with a stroke", p60. The Claimant reported to Occupational Health that he had difficulties mobilising and did not consider himself fit for work, p60.

49. The Claimant did not attend his physiotherapy appointments on the 12 and 19 February 2024, p78.

50. On 17 May 2024 Dr Sinani, Consultant Neurologist at Ealing Hospital, provided a report. She recorded that there had been "non-specific neurological complaints consisting of dizziness and unsteady gait" and "falls". She noted that MRI scans had shown, "moderate number of rounded foci of T2 – hyperintensity in the white matter of both cerebral hemispheres. The distribution is consistent with moderate small vessel disease. No evidence of acute ischaemia. Otherwise, unremarkable study."

51. Dr Sinani noted that the Claimant reported a long-standing history of persistent dizziness, blurry vision and unsteady gait. On examination, she found his gait to be good and range of motion full. She said that power, sensation and coordination were normal in the upper and lower limbs. She said, "I think there is functional overlay to his symptoms." P164.

52. Dr Sinani stated that the Claimant had been assessed by the TIA Clinic but that the evidence was not suggestive of a stroke, p164.

53. She recorded that the Claimant reported inability to sleep because of pain, low mood and financial issues which made him feel stressed, p163.

54. On 22 May 2024, Dr Sinani stated that all investigations were normal and the Claimant was on no regular medication, p166. On 22 May 2024 Dr Sinani referred the Claimant to an ophthalmologist for advice on his blurred vision as she said it was inconsistent with a stroke, p168.

76. On 18 June 2024 the Claimant discharged himself from the neuro rehabilitation physiotherapist . The letter stated 'no formal diagnosis there appears to be a functional overlay', p159.

55. On 1 June 2024 the Claimant advised that he did not want to start any medication, p75.

56. On the 3 October 2024 the GP notes recorded that the Claimant '*enjoys light exercise'*, p72.

57. While the Claimant stated to Occupational Health that he needed help washing and dressing and had significant ongoing dizziness and he did not think he was fit to return to work, p60, his 18 January 2025 statement to the Tribunal said, 'In June 2023 Claimant was helped by his wife to do daily work and thereafter Claimant does it himself' p58.

58. In his email of 18 January 2025, p410 -411, the Claimant stated that one of the effect of his impairments on him is that he needs to use a walking stick.

Depression, Anxiety, Low mood

59. On 6 October 2023, p294, the Claimant's medical records note that "a major depressive episode is likely", following what appeared to be an online self assessment completed by the Claimant.

60. However, 17 October 2023, the GP notes recorded, during a consultation about dizziness, that, although he was not sleeping well, the Claimant's mood was stable, p82.

61. On 18 December 2023 the GP notes also recorded, during another consultation about dizziness, stiffness and aches, that "His mood is stable and no red flags seen", p80.

62. The Claimant was cross examined about his these entries and what he told his GP. His evidence was that he told his GP what his mood was at precisely the moment the GP asked him about his mood. I did not accept his evidence. It was clear that the consultations were about the Claimant's ongoing symptoms. The natural understanding of the Claimant's description of his mood therefore also related to his ongoing state of mind, not his mood at that precise moment in time.

63. The Occupational Health report of 29 January 2024, which contained a detailed history of the Claimant's symptoms, made no mention at all of low mood, p59-61.

64. However, on 25 September 2024 the GP notes recorded that the Claimant was ' feeling down needs help with finances as unable to work … needs mh [mental health] support - agreed to counselling', p72.

65. The Claimant was diagnosed by his GP with depression on 9 October 2024, 8 months after his dismissal. The GP recorded a 1 year history of low mood and prescribed sertraline of 50mg.

66. In October 2024 the Claimant stated to talking therapies that he was '*no longer leaving the house, not shaving or grooming myself*', p 110/111.

Decision

Stroke, other Physical Impairment

67. It was clear from the medical evidence that, while a stroke was initially suspected following the Claimant's fall on 11 May 2022, this was not diagnosed by either Ealing or Northwick Park Hospitals when they investigated and reviewed him on 12 and 13 May 2022.

68. None of the diagnostic tests which were undertaken then, or later, supported a diagnosis of stroke.

69. Numerous entries in the medical records between 2022 and 2024 state that the Claimant's symptoms are not indicative of stroke: On 13 May 2022 his GP notes record, "seen at Ealing Hospital and reviewed at Northwick Park. No evidence of stroke and not medicated. … Has neck pain probably musculoskeletal but patient not willing to discuss." P97; On 28 December 2023 the GP notes recorded, "TIA has been ruled out and stroke unlikely as normal CT scan with symptoms across hemispheres", p80; . On 19 January 2024, the Occupational Health doctor, Dr Fisher, reported, "I do not think that his symptoms are in keeping with a stroke", p60; On 17 May 2024 Dr Sinani, Consultant Neurologist at Ealing Hospital, stated that the Claimant had been assessed by the TIA Clinic but that the evidence was not suggestive of a stroke, p164.

70. The Claimant has not had a stroke. He has not had and does not have a physical impairment of stroke.

71. I nevertheless considered whether he had some neurological-type symptoms/condition which had a long-term substantial adverse effect on his ability to carry out normal day to day activities during the relevant period (and from which I could deduce that he had some other form of physical impairment).

72. It is clear that the Claimant complained about dizziness and pain throughout 2022 and 2023 and was signed off work for neurological symptoms from July 2023 until his dismissal in February 2024.

73. However, while he continued to complain about the same ongoing dizziness, unsteady gait, and weakness in his limbs right up until 17 May 2024, Dr Sinani, a consultant neurologist found that, in fact, he had normal power in his arms and legs, had a good gait, was well-oriented, and his range of movement was full p163-164. She decided that there was functional overlay to his symptoms. That is, that his symptoms were not explained by any structural or pathophysiological medical mechanism and that there was some other psychological/psychosocial explanation. There was, however, no indication whether this other explanation was an emotional or psychological response, or deliberate exaggeration, for example.

74. There was also inconsistency the Claimant's his own evidence of adverse effects and in his engagement with medical professionals regarding these allegedly continuing symptoms.

75. The Claimant did not attend his physiotherapy appointments on 12 and 19 February 2024, p78.

76. On 1 June 2024 the Claimant advised that he did not want to start any medication, p75.

77. On 18 June 2024 the Claimant discharged himself from the neuro rehabilitation physiotherapist. The letter stated 'no formal diagnosis there appears to be a functional overlay', p159.

78. On 3 October 2024 the GP notes recorded that the Claimant, 'enjoys light exercise', p72.

79. While the Claimant stated to Occupational Health in January 2024 that he needed help washing and dressing and had significant ongoing dizziness and he did not think he was fit to return to work, p60, and the OH doctor considered that he was likely to be disabled because of his symptoms, his January 2025 statement to the Tribunal reported that, 'In June 2023 Claimant was helped by his wife to do daily work and thereafter Claimant does it himself' p58.

80. On all this evidence I was unable to conclude, on the evidence, that the Claimant really has experienced dizziness, unsteadiness, weakness in his limbs, inability to dress or help with household tasks, at any time. I acknowledge that he visited his GP on many occasions complaining of these and other symptoms, but the inconsistency in his history and the lack of any corroborating medical findings lead me to conclude that there is no reliable evidence that he did experience these adverse effects at all, or in a way which was more than minor, during the relevant period.

81. Given that he did not experience adverse effects on his ability to carry out normal day to day activities, I did not conclude that he had any neurological impairment during the relevant period.

82. He did not have a stroke and he did not have any neurological impairment during the relevant period. He was not disabled by reason of stroke or any other neurological condition at the relevant times.

Depression, Anxiety, Low Mood, other Mental Impairment

83. Again, the evidence was very contradictory.

84. The Claimant pointed out that on 6 October 2023 there was a record saying that "major depressive episode is likely", p294. That appeared to be the result of an online self assessment p294.

85. In the same month, however, during a consultation with his GP, he reported that his mood was stable. Two months later, again during a consultation with his GP, the contemporaneous note was that, "His mood is stable and no red flags seen", p80.

86. The OH report of 29 January 2024, which contained a detailed history, made no mention at all of low mood or depression having any effect on him, p62.

87. The Claimant was diagnosed by his GP as having depression in October 2024, but not before. The GP recorded that the low mood had persisted for more than a year, but that statement was contradicted by the contemporaneous GP and OH notes in October and December 2023 and January 2024.

88. On all the evidence, I did not conclude, on the balance of probabilities that the Claimant had depression, or more than minor low mood symptoms before October 2024.

89. I considered whether I could conclude, from the Claimant's ongoing reported dizziness and reported physical symptoms, that he had some form of mental impairment between May 2022 – February 2024. He had been signed off work from July 2023 to February 2024 with these symptoms.

90. However, where there was no medical evidence to support a finding that his reported symptoms arose from a mental impairment, I did not consider it was appropriate for me to decide that those symptoms indicated a mental impairment during that time, as opposed to some other cause or motivation, including exaggeration. The medical professionals have decided that the Claimant's symptoms were explained by "functional overlay", but there was no further explanation of what that was. There were not proper grounds for me to infer a mental impairment, on the balance of probabilities.

91. Regarding the Claimant's low mood, on the balance of probabilities I was unable to conclude that low mood did have an adverse effect on ability to carry out normal day to day activities between 2022 and February 2024 and / or were likely to do so (in that that could well happen) for 12 months thereafter.

92. The Claimant was not disabled by reason of depression, anxiety, low mood, or other mental impairment during the relevant period.

93. The Claimant was therefore not a disabled person at any of the relevant times.

Case Management

94. The Claimant has other complaints which will be decided at the final hearing. At the end of the hearing today, I discussed directions for the future conduct of the case. The dates for compliance with some directions needed to be changed as they had already passed. The date for the parties to agree the contents of the final hearing bundle and for the Respondent to send an electronic and hard copy of the bundle to the Claimant was changed to 14 March 2025 and the date for the parties to exchange their witness statements for the final hearing was changed to 11 April 2025. I emphasised to the Claimant that he must comply with these directions. He must carefully prepare his witness statement for the final hearing. He must include all his evidence about all the issues in the List of Issues and he must refer to relevant documents by page number in the bundle. I warned him that the Tribunal at the Final

Hearing might not allow him to go through multiple documents at length in his evidence, which he had not referred to in his witness statement, as I had allowed him to do today.

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Employment Judge Brown

Dated: ……..13 February 2025……..

Judgment and Reasons sent to the parties on:

20 February 2025
.....

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For the Tribunal Office