



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr R Smith

**Respondent:** The Restaurant Group United Kingdom Limited

**HELD AT:** Manchester

**ON:** 7 December 2016

**BEFORE:** Employment Judge Tom Ryan

**Appearances:**

For the Claimant: In person

For the Respondent: Miss L Amartey, Counsel

## PRELIMINARY HEARING

### JUDGMENT

1. The claimant was, at the material times, a disabled person.
2. The claimant's complaints of unpaid wages and breach of contract are dismissed upon withdrawal.

### REASONS

1. The claimant in this case Mr Smith who is 43 years old, was employed as a Manager for the respondent's business at Coast to Coast in Chester until he was dismissed earlier this year. He presented a claim of disability discrimination, unpaid wages and breach of contract. At the outset of the hearing he told me that the complaints for unpaid wages and breach of contract were withdrawn.

2. At this stage the entirety of the claimant's case has only been set out by him in a Scott Schedule which itself may be the subject of further applications depending on my finding on the primary issue that I have to consider namely whether the claimant was at the material times a disabled person.

3. The sole issue I had to decide is whether or not the claimant was disabled within the meaning of the Equality Act 2010.
4. Judge Rice-Birchall made directions at a preliminary hearing. They did not specifically include a requirement that the claimant should produce medical evidence but at Annex B of her order the claimant was to provide the respondent with all evidence on which he sought to rely and it was then said that that would include any medical evidence and a statement from him regarding the terms and effect of the impairments.
5. In fact the only evidence I have is the claimant's statement contained in an email sent to the Tribunal and the respondent on 30 November 2016 which the claimant has adopted as his witness statement, the oral evidence that he gave and a letter of his General Practitioner, Dr Mark Adams, who wrote a letter of 9 November 2016 in regard to the claimant's position.
6. The claimant's case is that he was disabled by reason of anxiety and depression.
7. Miss Amartey, recognising that Mr Smith is a litigant in person has conducted the case, in an entirely appropriate way. She accepted there was evidence upon which a Tribunal could find that the claimant was a disabled person but her submission to me, in summary, was that I ought not so to find because of the nature of the evidence. She cast doubt in submissions upon the accuracy and to some extent the veracity of the claimant's case but she stopped short of putting to him in round terms that he had said things that were untrue.
8. I start with matters that are really not in dispute. The claimant attended Dr Adams, his GP, on 14<sup>th</sup> April 2016 and the 20<sup>th</sup> October. The 14<sup>th</sup> April was the day after the claimant had been suspended and it was that process that led eventually and to his dismissal. It is clear that Dr Adams was responding to a request for a letter to confirm that the claimant's diagnosis was that he was suffering from anxiety and depression. Dr Adams recorded that Mr Smith attended at the surgery on 14<sup>th</sup> April and that he saw him. He described him as presenting with low mood, tearful, having reduced sleep and appetite and reduced concentration but that he was not suicidal. The claimant said he had suffered with low mood on and off for all of his life and at that time was working full time as a Restaurant Manager in Chester. He then went on to speak about what happened in work that day. He said that he was finding work very stressful. Dr Adams said he had advised him to speak to occupational health and the management to find some additional help in reducing stress levels. He was given a two week sick leave to help reduce his stress levels from work.
9. The doctor advised him to attend for counselling for low mood and depression and the claimant underwent an anxiety and depression score and those scores were 19 out of 21 for anxiety and 18 out of 21 for depression. I was not told precisely which tests were performed but on the face of it those appear to be high levels showing marked anxiety and depression as I infer from the letter. I did not understand Miss Amartey to contend to the contrary.

10. Dr Adams recorded that the claimant attended again on 20<sup>th</sup> October with low mood and depression symptoms. At that stage he was asking for a letter to support him appeal being sacked at work and confirming that he had attended the surgery for depression. It appears that the doctor said that solicitors would need to write in with an appropriate form of consent.

11. Miss Amartey says that the letter does not contain a formal diagnosis of anxiety and depression and, in those terms, that is right. She is right also that it is not necessary for me to be satisfied that there was an anxiety and depression diagnosis. I should say that, were I required to consider whether the doctor had reached such a diagnosis, on balance and having read what the doctor has written I would be satisfied that if you were asked he would confirm that.

12. Before me however, it is necessary for the claimant to establish not only that he had a mental impairment, and anxiety and depression clearly satisfies the test of being a mental impairment, but also that it has long-term substantial adverse effect on his ability to carry out day-to-day activities. Those activities may include work activities but need not do so. Day-to-day activities are not under the Equality Act 2010 prescribed as they were under the Disability Discrimination Act 1996 so there may be other day to day activities which were not in that previously prescribed list which may now be considered. The requirement for "long term" substantial adverse effect is that the effect must have lasted or be likely to last for twelve months or the remainder of the person's life.

13. It is the claimant's case, that he has in fact suffered from anxiety and depression throughout his adult life from his late teens. He was not able to tell me what first caused this to happen but he has said he had a constantly nervous feeling and it is that which led to persistent and repeated heavy perspiration. I note that in itself may constitute a physical impairment but, if so, it is not one which the claimant specifically relies on as yet in these proceedings. He relies on it as a symptom or consequence of the anxiety and nervousness. I accept that such heavy perspiration as the claimant has to deal with could itself compound feelings of anxiety. The claimant himself is not able precisely to say which came first, but he recalls suffering from anxiety before the onset of the problem with perspiration.

14. I deal with the perspiration as a component then of the factual scenario that the claimant described. The perspiration is so severe that the claimant has had in his adult life to take into work and secrete tins of deodorant around the workplace. He takes a change of clothes to work on a daily basis. He told me in oral evidence that he would buy two identical shirts for example so that he could take a clean shirt. He would use the disabled lavatory in order to go in take his shirt off, dry it off or put on a clean shirt and apply deodorant.

15. He tells me that over a period of time he has taken to using a specific perspiration inhibitor spray called Odaban which he buys over the internet. He says its not available over the counter in normal chemists although other strong deodorants are available. It does not have a deodorant smell in the sense of the scented or perfumed smell that some deodorants have and in fact has a slightly medicated smell and he uses that to help control the perspiration on average twice a week.

16. The effect of this is that it inhibits his social interactions. He will, when his mood is low and he is likely to perspire or is perspiring, become tearful. This happens sometimes on an almost daily basis. At other times it occurs every few days or so. He avoids social engagements such as going out for drinks with friends or going out to dinner when he can. However, his anxiety peaks at time and particularly when he is in work related interactions such as meetings or social events at work which cannot be avoided, he will perspire to an even greater extent.

17. The claimant gave evidence that he had hidden this condition and the symptoms from it during his life. He had felt a sense of low esteem and it was only when he met and I think at or about the time he married his wife that he confided in her.

18. Because the claimant had hidden this condition from others and because he would leave work to go to the lavatory to change his shirt and use the deodorant, he was from time to time perceived as shifty and people would say that of him. He described with reticence and with considerable emotion a situation which occurred whilst he was still in Oxford some years ago working there. He realised that he had to tell his partner what it was because she told him that she felt he was hiding something from her. This of course was true. Realising, as he said to me in submissions, that he could get another job but he couldn't get always get another partner or wife he brought himself to tell her. As a result, they both wept and began from then to work out strategies to help the claimant deal with it. He described that he had previously resigned from two well paid jobs, because he thought they would dismiss him once they realised he was not good enough, such was the extent of his lack of self worth.

19. In terms of his more recent job history he worked at Browns Restaurant in Oxford from mid 2009 until the beginning of 2011 and he resigned from that as a result of what he described as a breakdown and flare up of his anxiety and depression. He then went to a company called The Missing Bean in Oxford as a Manager managing two coffee shops, a sushi bar and a roasting establishment in Witney and then in June/July 2013 he and his wife moved to Lancaster where he opened a coffee shop which was his own business and that continued until in February 2015 he joined the respondent's business.

20. He was engaged I think with the intention of him managing the Chester premises that he did eventually move to but those premises were not then open. So initially the claimant was living in Lancaster and managing the respondent's business in Broad Street, Birmingham.

21. It was while there that he had something of an outburst or a breakdown in front of the manager Derek Mallon on an occasion I think of a bartender championship. He described both in evidence and to some extent in his submissions that Mr Mallon asked him what was the matter. He expressed his feelings of anger and depression at the way he felt he had been treated by the company. Mr Mallon asked him if he was OK and, the claimant said he was. The claimant told me that as a consequence he was offered time off work. There is something of a factual dispute between the

parties as to whether he was offered time off work so he could spend more time with his family or to get over the depression.

22. The claimant's case is that a number of people came up to him and spoke to him and asked if he was alright and encouraged him not to resign. These included people whom he had never met before. It is suggested by the respondent that he had told them then of his disability. The claimant clarified that he had not done so and I am satisfied that he is unlikely to have done so because of his reticence in telling even close personal friends or partners before that, but he was expressing the distress and what his perception was I should say of how the company treated him.

23. I make no finding of fact as to the treatment that the claimant alleges at that point. I recite these matters only to record that the claimant has said them. It might be thought Inherently unlikely that he would have given a full description of the anxiety that he has described to me at that stage but I am not considering the question of knowledge on the part of the respondent at this stage.

24. One other earlier event is relevant. The claimant in evidence explained to me that he had over the course of his life from time to time contemplated seeking medical help and had not done so. He had even gone so far as making an appointment with a doctor but then having as he put it "bottled it" and said to the doctor he thought he might have Irritable Bowel Syndrome. The claimant's evidence given to me orally for the first time, it is not in his witness statement and is not in the doctor's letters, is that part of the component of his condition is that he has to go the lavatory more frequently than normal, something in the order of 14 times a day. He told me he had mentioned that to a GP from his time in Oxford in about 2007/2008 and he had blood and stool tests for Irritable Bowel Syndrome. They came back negative and the doctor did not take it further. At that stage he recalls one occasion when the possibility of there being an anxiety related cause was discussed with the doctor. He could not remember whether he had suggested to the doctor or the doctor to him, but he thought it more likely that the doctor had said it to him. Having seen the claimant and heard his evidence I think it is more likely that the doctor mentioned it. Be that as it may, even then the claimant did not feel able to go further and explain to that doctor at least the extent of his condition as he believed it to be.

25. The way in which the matter has gone on is that he has, since he saw Dr Adams in Chester, been referred for counselling. He has described to me how his wife was on at him all the time to get him to the doctor, how she had helped him through a particularly bad time which was when he left Browns in Oxford.

26. The effect of the anxiety is that he feels a certain level of anxiety on a daily basis but more extreme anxiety coming in waves. He copes with work but he finds there are problems. He is self conscious about his self worth and he is self conscious about the perspiration. Of course as a manager of a restaurant chain he has to deal with staff and he has to do the administration tasks. He does not suggest he is unable to concentrate on his work. He contends his need to absent himself for time to go to the lavatory to change his shirt, to dry himself off and so it has an effect both on his social interactions and his workplace interactions.

27. The parties are in dispute as to the extent as to which the respondent were aware or otherwise of this condition or the symptoms of this condition but I am making no finding about that, it is not a necessary part of my enquiry at this stage.

28. The claimant also describes a level of anxiety which, when he is finding difficulty in coping, means he does not want to speak to his wife or his children. His wife he tells me has learnt to cope with it. She copes with it, I accept by not speaking to him, leaving him to himself for an hour or sometimes an evening or sometimes until the next day until he comes through it to the point where they can sit down and have a discussion.

29. The claimant exhibited in the hearing at least some symptoms of anxiety beyond what I would normally expect from someone who is clearly an intelligent, insightful witness giving evidence about himself, even in the embarrassing situation of having to describe these things in a public hearing.

30. It is right as the respondent submits that there is no corroboration of the claimant's account beyond the limited corroboration provided by the letter of Dr Adams.

31. Taking all that into account, making proper allowances for the claimant being a litigant in person, the substance of the claimant's evidence persuaded me as to its veracity and its credibility.

32. It is right for Ms Amartey to say as she does on the facts that the time the claimant went to the doctor in April 2016 was the day after he was suspended and that fact suggests that the condition was not present before. In my judgment the fact that he went to his doctor the day after he was suspended is also consistent with the possibility that the anxiety may have flared as a result of his being suspended. In those circumstances it says nothing persuasive to me about whether the claimant is telling me the truth or otherwise in his description of what went before. People are sometimes reticent about talking to even doctors about medical conditions, particularly if one has a condition that affects self esteem and mood. I can understand why that may at least be in part an explanation for why the claimant has not mentioned it.

33. This claimant gave, in my judgment, a credible account and one which I have no real difficulty in accepting. It is still necessary for me to be satisfied that the impairment and the facts as described amount to a substantial adverse effect upon day to day activities.

34. Dealing with life and without having to absent yourself during the day for extra deodorant or changes of shirts even if that doesn't happen on a daily basis but only only happens more frequently in stressful situations is still in my judgment and effect on day-to-day activities that is more than trivial. As is the inability to communicate with your wife and children during a period of anxiety and depression to the extent that you have to absent yourself from their company for hours at a time. There are times when all of us in our personal relationships may need personal time as it is sometimes called but what the claimant described is in my judgment a significant level above that.

35. I have for on the basis of these findings and for those reasons come to the conclusion that the effects on the claimant's day to day activities amount to a substantial adverse effect.

36. Accepting the claimant's evidence as I do I have no reason to doubt that this has been the position for several years.

37. I record that I have taken into account all the factual matters advanced in submissions by Ms Amartey. I mention also that I have had regard to paragraphs A.3 and B.4 of the Guidance on Matters to Be Taken into Account in Determining Questions Relating to the Definition of Disability (2011).

38. I find on the balance of probabilities that the claimant was at the material time a person with a disability.

---

Employment Judge Tom Ryan 10 February 2017

JUDGMENT AND REASONS SENT TO THE PARTIES

ON:

13 February 2017

FOR THE SECRETARY OF THE TRIBUNALS