



EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT

V

RESPONDENT

Mr W Santos Ramos

Royal Mail Group Ltd

Heard at: London South Employment Tribunal

On: 19 March 2020

Before: Employment Judge Hyams-Parish

Representation:

For the Claimant:

In person

For the First Respondent:

Ms A Greenley (Counsel)

JUDGMENT ON PRELIMINARY ISSUE

At all material times the Claimant was not a disabled person within the meaning of s.6(1) Equality Act 2010. For this reason, the Claimant cannot pursue his claims of disability discrimination which are dismissed.

REASONS

Claim

1. By a claim form presented to the Tribunal on 25 March 2019, the Claimant brings claims of disability discrimination and unfair dismissal.
2. The claims of disability discrimination were not particularised in the claim

form itself but were supplied pursuant to an order by Regional Employment Judge Davies at a case management hearing. It is clear from these particulars that the Claimant brings claims pursuant to sections 13, 15, 20/21, 26 and 27 Equality Act 2010 ("EQA"). The alleged acts of discrimination occurred between 14 November 2018 and the Claimant's dismissal on 21 February 2019. This is the material time referred to at paragraph 15 below.

3. The claims are denied in their entirety by the Respondent. The Respondent further denies that the Claimant was disabled within the meaning of s.6(1) EQA.

Hearing

4. The purpose of this Preliminary Hearing was to determine whether the Claimant was at all material times a disabled person within the meaning of the EQA, thereby allowing him to proceed with his claims for disability discrimination.
5. This hearing was conducted remotely using Skype. A face to face hearing was not possible due to recently issued Presidential Guidance that all "in person" hearings should be cancelled until further notice in view of the Covid19 pandemic.
6. At the beginning of the hearing, I explained that if the case were to proceed using Skype, I would reach a determination in the same way as I would at a face to face hearing. I asked each party if they consented to the hearing being conducted using Skype and both parties confirmed that they did.
7. I was provided with a bundle of documents for the hearing extending to 78 pages, which included an impact statement from the Claimant, together with GP and occupational health notes.
8. The Claimant confirmed that he had received and had read all of the documents referred to, including the skeleton argument provided by the Respondent's Counsel.

Relevant law

9. The law on the definition of "disability" can be found in section 6 EQA, with further assistance provided in Schedule 1 of the same.
10. Section 6(1) defines disability as follows:

"A person (P) has a disability if P 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"

11. The above definition poses four essential questions for me to answer:
- a. Does the Claimant have a physical or mental impairment?
 - b. Does that impairment have an adverse effect on the Claimant's ability to carry out normal day-to-day activities?
 - c. Is that effect substantial?
 - d. Is that effect long-term?

12. The definition of "long term" can be found in paragraph 2(1) of Schedule 1 to the EQA which says as follows:

- (1) The effect of an impairment is long-term if it:-**
- a. has lasted for at least 12 months**
 - b. is likely to last for at least 12 months, or**
 - c. is likely to last for the rest of the life of the person affected.**

13. The term "*substantial*" is defined in section 212(1) EQA as meaning "*more than minor or trivial*".

14. Guidance on the definition of "disability" is contained in a document produced by the Office for Disability Issues called "*Guidance on matters to be taken into account in determining questions relating to the definition of disability*" ("the Guidance"). The Guidance includes the following extracts:

[A3] The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition and in particular whether they are long-term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects.

[A6] It may not always be possible, nor is it necessary, to categorise a condition as either a physical or a mental impairment. The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa.

[A7] It is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded. For example, liver disease as a result of alcohol dependency would count as an impairment, although an addiction to alcohol itself is expressly excluded

from the scope of the definition of disability in the Act. What it is important to consider is the effect of an impairment, not its cause – provided that it is not an excluded condition.

[C3].....‘likely’, should be interpreted as meaning that it could well happen.

[C4] In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age).

[C7] It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the ‘long-term’ element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily. Or other effects on the ability to carry out normal day-to-day activities may develop, and the initial effect may disappear altogether.

[B4] An impairment might not have a substantial adverse effect on a person’s ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect.

[B5] For example, a person whose impairment causes breathing difficulties may, as a result, experience minor effects on the ability to carry out a number of activities such as getting washed and dressed, going for a walk or travelling on public transport. But taken together, the cumulative result would amount to a substantial adverse effect on his or her ability to carry out these normal day-to-day activities.

15. The time at which to assess whether the Claimant is disabled (i.e. whether there is an impairment which has a substantial and long-term adverse effect on normal day-to-day activities) is the date of the alleged discriminatory act. This is what is referred to as the “*material time*” in this Judgment. An employment tribunal is entitled to infer, on the basis of the evidence presented to it, that an impairment found to have existed by a medical expert at the date of a medical examination was also in existence at the time of the alleged act of discrimination.
16. In reaching a determination on this issue, I must bear in mind that the burden is on the Claimant to prove that he was disabled during the material

time. I have based my conclusions below on the evidence before me at the hearing, which was the Claimant's oral testimony, including his impact statement, and the documentary evidence referred to during the hearing.

Background facts

17. It is not in dispute that the Claimant was employed by the Respondent between 23 April 2012 and 21 February 2019. He was employed as an Operational Postal Grade at its Catford Processing Unit. The Respondent contends that the Claimant was dismissed for (i) taking mail home; (ii) mail delivery not being completed on a given day; (iii) not reporting to a manager that mail delivery had failed; and (iv) delivering mail on a rest day without his line manager's knowledge. On 10 December 2018, the Claimant was suspended from work pending an investigation into the above allegations. On 31 January 2019, the Claimant attended a disciplinary hearing, as a result of which he was dismissed with effect from 21 February 2019.

Evidence

18. The Claimant gave evidence under oath during the hearing. He had provided an impact statement and adopted the content of that statement as his evidence in chief. He was then cross examined by Counsel for the Respondent.
19. The Claimant said that he had suffered with anxiety and depression since November 2017 although he said it was "*not formally referred to as depression until 7 August 2018*". The reference to 7 August 2018 was a letter to his GP from an organisation called Croydon GP Hub. It was a very brief letter, essentially recording the fact that the Claimant had visited the GP Hub, on which the words "*Depression, work related stress, requesting Med 3*" were provided under the heading "*Diagnosis/Reason for attendance*".
20. The Claimant told me at this hearing that both conditions are likely to last for the rest of his life. The Claimant said that he was taking Sertraline (an anti-depressant) and also Omeprazole to manage the stomach ulcers he said were as a result of the stress and anxiety he felt as a side effect of the Sertraline.
21. On the subject of the impact on day to day activities, the following is an extract from his impact statement (sic):

5. Without the medication I would simply not be able to function. Prior to being diagnosed and being prescribed medication, from around November 2017, I had great difficulty motivating myself to get out of bed on a morning which resulted in me having a couple of days off work, as well as being late on occasion.

6. I became very demotivated and lazy. There were days when I would not shower, and I stopped cooking for myself, relying on fast food which I had delivered to my home as I did not want to go outside. I found myself becoming incredibly anti-social and stopped talking with my friends and family, ultimately resulting in my brother and sister no longer speaking with me.

7. I stopped playing sports and going to the gym. I used to go to the gym 5 times a week and had quite a muscular build, but since January 2018 I have barely been to the gym.

8. I became a very angry person, and even the smallest thing could cause me to argue with the limited number of people I came in to contact with. I regularly fell out with my partner over what I now see as very trivial issues.

9. At the end of June 2018, things became really bad, and I remember going to sleep one evening wanting to go to sleep and never wake up. It was at this point that I went to see my GP.

10. Despite my GP's intervention and being prescribed medication, my mental health continued to deteriorate. My self-esteem was incredibly low, I became more and more anti-social just sitting in my room which was in a shared house and spent no time with my house mates. In around

26 June/July 2018, I began suffering with panic attacks. These attacks made me feel the need to constantly move around the room, my heartbeat would be really fast, and I would struggle to breathe. Sometimes, following such an attack, I would feel almost paralysed and unable to move for several minutes. It was around this time that I also started to suffer with insomnia.

11. I had my financial responsibilities taken away by my partner Lee as I was not paying bills or rent, instead spending money on random items online to try and combat my depression. He took control of my finances ensuring that bills etc were paid on time as I couldn't do this myself.

12. Since around September 2018 I have felt unable to use public transport at peak hours. I get extremely anxious and claustrophobic, and as a result I do my grocery shopping after 10pm when I know the stores and streets will be less busy.

13. I was absent from work during this period until November 2018, however, on my return things got worse. I had a panic attack at work on 8th December 2018, the day that resulted in my suspension.

14. Following this I developed OCD and became agoraphobic, staying locked in my flat for days. I was taking in excess of 10 cold showers a day in an attempt to suppress my anxiety, would spend the rest of the time asleep, often 16 hours a day, and began having suicidal thoughts.

15. I believe that my medical conditions had a substantial impact on my ability to carry out normal day to day activities, including sleeping, personal hygiene, and socialising, even having suicidal thoughts when things got really bad.

22. The Claimant's GP notes ("the GP notes") were included in the bundle, going back to August 2016. Despite the Claimant saying in evidence that he suffered from anxiety and depression since November 2017, the GP notes did not refer to a diagnosis of anxiety and depression until 3 July 2019. Prior to 25 June 2018 there is no hint of the Claimant presenting with symptoms of workplace stress, anxiety or depression.
23. The GP notes show that on 25 June 2018, the Claimant went to his GP and was diagnosed with "stress at work". He was given a fit note stating that he was not fit for work for the period from 25 June 2018 to 9 July 2018. The GP notes record the following:

History

Works as postman

Increasing job responsibilities with no extra time

Causing him a lot of pressure

Ongoing for 2/12 now

Not sleeping and worried about work

Not enjoying life at the moment as so tired

Doesn't think he's depressed

Spoke with occupational health who advised him to see GP

Has a union – advised him to liaise with them

Comment

Med3 for 2/52

Review if not better

24. The Claimant attended his GP on 5 and 19 July 2018 to renew his fit note. Both stated "stress at work".
25. At around this time, the Claimant was referred to Occupational Health ("OH") by his employer, triggered by the number of absences from work. He had a telephone consultation with OH on 18 July 2018. In a report, also dated 18 July 2018, there is the following extract (sic):

Thank you for referring Mr Walacy Santos Ramos who has triggered stage 3 of the Royal Mail sickness absence policy. I undertook a telephone consultation today.

Mr Ramos informs me that he is currently off sick with work-related stress, for the last four weeks due to alleged bullying and harassment at work, as he was coming late to work, since he has shifted his residence six months back and the daily commute is now 90 minutes one way. He had applied for some place near his new home address, but he was only offered part-time hours, which he feels he will not be able to manage financially. Due to the stress at work he feels low in mood, socially isolated, low self-esteem and confidence, he was seen by his GP, who advised him to take some time off work.

Mr Ramos is not on any medication and is not been referred for counselling. Apart from this he has no other underlying medical condition and is not on any regular medication.

[NOTE: the letter makes reference to periods of sickness absence from June 2017 to May 2018, none of which relate to workplace stress]

All were due to self-limiting conditions. The term “work-related stress” is often used to describe a variety of symptoms, behaviours and interpersonal disputes or pressures at work, leading to absence all sub-optimal work performance.

It is my opinion that this absence is primarily associated with non-medical issues and that the causes of his absence are predominantly related to the ongoing situation. Once any issues are able to be resolved it is anticipated that any adverse health effects he may be experiencing should reduce. Given this I would suggest that Management invite him in to see how his concerns can be addressed in order to facilitate his return to work.....

26. Under the heading “Disability Advice” OH gives an opinion that the Claimant is not covered by the EQA which I interpret to mean an opinion that the Claimant was not disabled.
27. The GP notes on 9 August 2018 show that the Claimant visited his doctor again and was diagnosed with stress at work and recorded the following comments:

History
Getting work
Not sleeping
No suicidal thoughts
Would like sleeping tablet
Will contact IAPT
Examination
Low suicide risk
Talkative
Comment
Promethazine for 2 weeks

28. The GP notes on 31 August 2018 show that the Claimant was diagnosed with stress at work and recorded as follows (sic):-

History
Req zopiclone as promethazine made anxiety worse
Also req another med3 for 1m
Planning to move to S London in 2w where his job will be transferred
Looking forward to move
Good support network
Not called IAPT yet

29. The GP notes on 01 October 2018 record a diagnosis of stress at work and state the following (sic):-

Medication
Citalopram 10mg tablets. One to be taken each day 28 tablet

History

*Patient attends due to ongoing anxiety
Has started IAPTS and is engaging
No thoughts of self-harm
Anxiety most in the morning
Discussed starting medication – pt now feels that would be helpful.*

Comment

*For low dose citalopram
Discussed side effects – especially possible GI
Review next week to follow up*

30. The Claimant visited his GP on 5 November 2018 and was again diagnosed with stress at work.
31. By January 2019, the Claimant had changed GP. On 11 February 2019, the Claimant visited his new GP and he was diagnosed with stress at work. By this time the Claimant had been suspended and had been invited to a disciplinary hearing. The GP notes for that visit record the following (sic):

History

*Only just registered
Has been living in Purely, works for Royal Mail.
Anxiety and depression for about 8-9 months. Saw GP in Nov 18 and started on Citalopram 10mg od, started it but after a few days stopped it as SEs-
Tiredness/restless but mainly stopped as was made to rtw on 15.11.18, advised if not would lose his job
On 10.12.18 was suspended as had panic attack and took some mail home to deliver the next day, concerned re constructive dismissal, lx underway
Restarted citalopram after suspension but it ran out on 10.1.19- would like to restart
Also, would like some Zopiclone, helped++before, tried OTC meds and another from GP made him more anxious. Advised revisit this request when his notes have come through,
Also, will need medical report/copy of notes for employer at some point
Advised he needs to see Occ Health
Agrees to IAPT self-referral*

Comment

Restart Citalopram

32. On 21 February 2019, the day the Claimant was dismissed, he visited his GP and was diagnosed with stress at work. The following was recorded in his GP notes (sic):

History

*see below
states was unfairly dismissed from work today
he had an absence from work 6/12 with stress
on background of bullying and harassment at work according to him
he states he had discussed with trade union at time which were not helpful
main stress and low mood came from this
states client with citalopram given now*

*is after a doctor's report
we do not have notes*

Comment

*explained that we cannot do backdated report for previous period of time as we
at present do not have his notes
also there should be appeal process that he follows at work including
occupational health and enlisting the help of trade union which I believe he
should pursue
also suggest he consider citizens advice bureau
will fu with us in a couple of weeks before citalopram runs out*

33. On 25 February 2019, therefore outside the material time, the Claimant attended a meeting with OH, notwithstanding by this time the Claimant had been dismissed. The report provided by OH concluded, at that point, that the Claimant was suffering from severe anxiety and depression. Despite this, the report also stated, "*In my opinion Mr Walacy Santos Ramos is not covered by the Equality Act currently, however this could alter in the future*". In the report the Claimant is recorded as having provided the following answers to questions:-

Daily Routine, (sleep pattern, washing, dressing, daily activities etc.) *Sleep remains poor
Manges all other
ADL*

Household activities (laundry cooking, ironing, making beds) etc. *No issues*

Activities outside the home (hobbies, gardening, shopping, social activities). *Not much*

General activities (walking, climbing stairs, sitting, driving) *No issues*

34. I concluded that the authors opinion was that, despite the diagnosis of anxiety and depression, the Claimant was still not disabled within the meaning of the EQA because the impairment did not have a substantial and long-term adverse effect on the Claimant's ability to carry out day to day activities.
35. Under cross examination by the Respondent's Counsel, the main focus was on the diagnosis by the Claimant's GP during the material time and why it said work related stress rather than anxiety and depression. The Claimant rather contradicted himself during evidence on this point, at one point suggesting that he had agreed with his GP that she would not record the diagnosis as anxiety and depression because of what he suggested was the stigma associated with being depressed. When asked why he did not mention to his GP the impact on his ability to carry out day to day activities, as stated in his impact statement, he said that depression was for lazy people and that is why he did not inform his GP of the impact of his condition. He also said in evidence that he didn't at that time think he had

depression. I asked the Claimant why he had not obtained a report from his GP if he felt that his records did not accurately reflect his diagnosis and presentation at the time, given that he must have known that such evidence would be important for this hearing. He said that he had asked for a report, but he had not received anything. I asked why he did not chase it up, but all the Claimant could say is that he did try to obtain one.

Submissions

36. I considered carefully the submissions made by both parties before reaching my decision. In her submissions, Counsel for the Respondent referred to the following three cases:

- *J v DLA Piper UK LLP [2010] IRLR 936*
- *Gallop v Newport City Council [2014] IRLR 211*
- *Herry v Dudley Metropolitan Council [2017] ICR 610*

37. The Respondent submits that any occupational stress that the Claimant was experiencing at the material time did not meet the criteria for a mental impairment but instead was a reaction to life events. She referred me to paragraph 56 in *Herry v Dudley Metropolitan Council* in which Richardson HHJ said, “*although reactions to adverse circumstances are indeed not normally long lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, yet in other respects no or little apparent effect on normal day to day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An Employment Tribunal is not bound to find that there is a mental impairment in such a case*”.

Analysis, conclusions and associated findings of fact

38. Having considered the evidence very carefully, I find that the reason the Claimant's GP recorded work related stress on the GP notes, as opposed to anxiety and depression, was because the Claimant was reacting to work related problems. He continued to visit his GP for work related issues and there continued to be a diagnosis of work-related stress.

39. I do not accept as credible the Claimant's evidence that he reached an agreement with his GP that s/he would avoid noting any reference to anxiety and depression. I note that later in 2019 the diagnosis anxiety and depression is stated on his GP notes and therefore I am not sure why the agreement not to refer to depression, and the rationale for it, did not continue past July 2019. If what the Claimant said was true, I believe he would have recognized the crucial importance of obtaining a report from his GP, particularly having disclosed his GP notes and noting the absence of

any reference to depression, so that his GP would have been given the opportunity to comment on, and importantly explain that in his or her view s/he considered the Claimant to be suffering from anxiety and depression, notwithstanding the diagnosis actually recorded on the GP notes. I did not find the Claimant's explanation for not obtaining a report from his GP particularly persuasive; indeed, I doubted whether what the Claimant said in evidence on this issue, was true or accurately reflected the real reason for not obtaining a report.

40. Before concluding on the issue whether the Claimant suffered from a mental impairment, I considered the substantial adverse effect the Claimant said that the impairment had on his ability to carry out day to day activities. Here there was a stark contrast between the Claimant's impact statement and the commentary on the GP notes. I do have significant doubts about what is now claimed by the Claimant in his impact statement for three reasons: firstly the Claimant is not sufficiently precise in his impact statement and his evidence about when, and for how long, the Claimant suffered the adverse effects referred to; secondly there are inconsistencies between the commentary in the GP notes and the impact statement; and thirdly, there are significant matters contained in the impact statement which one would have thought would have been recorded in the GP notes.
41. On the inconsistency issue, I see that there is a comment in the GP notes of the Claimant's visit to his GP that the Claimant "*doesn't think he is depressed*". The Claimant also says in his impact statement "*I remember going to sleep one evening wanting to go to sleep and never wake up*" suggesting that he did not want to live. Yet in the GP notes of his visit to the GP on 9 August 2018, the following is noted: "*no suicidal thoughts*" and "*low suicidal risk*".
42. The Claimant said that in June/July 2018 he started suffering panic attacks, his heart rate would increase, and he would struggle to breathe. He also says that he would feel paralysed and unable to move for several minutes. These concerns raise the kind of health issues that one would have expected to be on the GP notes. There is no mention of these issues in the GP notes for the Claimant's visits to the GP in June, July or August 2018. I find that there are no GP notes of these issues because the Claimant did not mention them and I believe it most likely that he did not mention them because he was not experiencing these adverse effects at that time, contrary to what the Claimant said in his impact statement.
43. In the same vein, the Claimant said in his impact statement that after December 2018 he "*developed OCD and became agoraphobic, staying locked in my flat for days. I was taking in excess of 10 cold showers a day in an attempt to suppress my anxiety, would spend the rest of the time asleep, often 16 hours a day, and began having suicidal thoughts*". Once again, I am surprised that there is no reference to OCD in the GP notes or

that he was having suicidal thoughts. Again, I find it unlikely that the Claimant experienced such adverse effects given that he said nothing to his GP about them.

44. For the above reasons, I do not find the Claimant's impact statement or his evidence to be a reliable source of evidence to demonstrate that he was suffering a substantial and adverse effect on his ability to carry out normal day to day activities. Looking then to the GP notes, the only reference to any effect on day to day activities during the material time is the Claimant's difficulty sleeping. That was first mentioned in June 2018.
45. Pulling all of this together and stepping back in order to answer the questions at paragraph 11 above, my conclusions are as follows:

Does the Claimant have a physical or mental impairment?

46. I am not persuaded that the Claimant was suffering from a mental impairment during the material time. I recognise that the line can often be blurred between someone reacting to a set of circumstances at work, with the effect that can have on an employee, and someone suffering from depression. However, I rely on the diagnosis provided by the GP, supported by the OH report in July 2018, and find that there was a reason why they decided to diagnose the Claimant with work related stress rather than depression. I find that the reason for this was the Claimant's preoccupation with work issues being the main reason for visiting the doctor and the main reason for why he was feeling as he was. He was not presenting with other symptoms of depression. Support for that analysis can be seen in the GP notes from the visit on 21 February 2019 when in response to the comment "*background of bullying and harassment at work; according to him he states he had discussed with trade union at time which were not helpful*" the GP notes the Claimant's comment: "*main stress and low mood came from this*"

Does that impairment have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities? Is that effect long-term?

47. As I have concluded that the Claimant was not suffering from an impairment, this question is somewhat academic. However, for completeness, I am persuaded that the inability to sleep falls within the definition of a substantial effect on one's ability to carry out a normal day to day activity. However, I find that the difficulty the Claimant found sleeping was a reaction to the work-related stress suffered by him. As the Claimant presented with these symptoms in June 2018, the adverse effect had not lasted 12 months by 21 February 2019 and there was no evidence available during the material time to suggest, or from which I was prepared to infer, that it was likely to last 12 months or for the rest of the Claimant's life.
48. For the above reasons, it is my decision that the Claimant was not a

disabled person within the meaning of the EQA. As such, the Claimant is not permitted to bring his disability discrimination claims, which are dismissed.

**Employment Judge Hyams-Parish
27 March 2020**