



## EMPLOYMENT TRIBUNALS

**Claimant**  
Ms A Adeleke

v

**Respondent**  
Tesco Stores Limited

## PRELIMINARY HEARING

**Heard at:** Watford

**On:** 2 August 2021

**Before:** Employment Judge Alliott (sitting alone)

### Appearances:

**For the Claimant:** In person  
**For the Respondents:** Ms A Smith (Counsel)

## JUDGMENT

The judgment of the tribunal is that:

1. At all material times from 15 April 2018 to 5 March 2020, the claimant was a disabled person within the meaning of s.6 of the Equality Act 2010 by reason of lumbar disc degeneration.
2. At all material times from 15 April 2018 to 5 March 2020, the claimant was not a disabled person within the meaning of s.6 of the Equality Act 2010 by reason of stress and anxiety.

## REASONS

1. This open preliminary hearing was ordered by Employment Judge Bedeau on 16 November 2020 to determine the following issues:
  - 1.1 Whether at all material times during the claimant's employment with the respondent she had a physical and mental impairment, namely lumbar disc degeneration and stress and anxiety?
  - 1.2 If so, do the impairments have a substantial adverse effect on the claimant's ability to carry out normal day to day activities?
  - 1.3 If so, is that effect long-term. In particular:

1.3.1 When did it start?

1.3.2 Have the impairments lasted at least 12 months?

1.3.3 Or were the impairments likely to last at least 12 months or for the rest of the claimant's life?

## The law

2. Section 6 of the Equality Act 2010 provides as follows:

“6 Disability

(1) 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.”

3. In addition, I have the guidance on the definition of disability (2011). In particular:

“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... what is important to consider is the effect of an impairment, not its cause.”

“B1 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. A substantial effect is one that is more than a minor or trivial effect.”

4. The burden on establishing disability is on the claimant.

5. Ms Smith has cited two cases to me as follows:-

5.1 J v DLA Piper UK LLP [2010] ICR 1052 where Underhill J said there is a distinction between:

“... two states of affairs which can produce broadly similar symptoms: Those symptoms can be described in various ways, but 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... 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 paragraph 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 observations that such reactions are not normally long lived.”

**5.2 The case of Herry v Dudley Metropolitan Council [2017] ICR 610 where Mr Justice Richardson stated:-**

“Although reactions to adverse circumstance are indeed not normally long lived, experience shows there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where a person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse 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. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an Employment Tribunal) are not of themselves mental impairments: They may simply reflect a person’s character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an Employment Tribunal with great care; so must any evidence of adverse effect over an above an unwillingness to return to work until an issue is resolved to the employee’s satisfaction; but in the end the question whether there is a mental impairment is one for the Employment Tribunal to assess.”

**6. The evidence**

6.1 I heard oral evidence from the claimant. In addition, I was provided with a 265-page preliminary hearing bundle which included the claimant’s impact statement.

**7. The facts**

7.1 I have been provided with a letter dated 5 May 2016 from a consultant psychiatrist from the Tavistock Trauma Service. This states:-

“Ms Adeleke has been under my care in the Tavistock Trauma Service since 2010. She has a diagnosis of Post-Traumatic Stress Disorder and depression which is treated with a combination of medication and psychotherapy.”

7.2 I have little hesitation in finding that the claimant does have the mental impairments of Post-Traumatic Stress Disorder and depression, and that that has been long lasting. I have taken this diagnosis into account in my assessment of this case. In particular, the claimant told me that she was discharged from the Tavistock Trauma Service in January 2018.

- 7.3 An Occupational Health Report dated 4 July 2019 states:-
- “[The claimant] states she was diagnosed with depression relating to personal issues which are now resolved and she is not on any medication for this.”
- 7.4 The claimant agrees that the diagnosis of Post-Traumatic Stress Disorder and depression was different from the disability that she relies upon in this case.
- 7.5 The disability that the claimant relies upon is anxiety/stress. Being an allegation of mental impairment so, for obvious reasons, I have relied significantly on the contemporaneous medical evidence and description of its impact.
- 7.6 The claimant has disclosed her GP notes, though it appears there may be some gaps. It can be seen that in March and April 2018, prior to the claimant’s employment with the respondent, the claimant attended her GP with depressed mood and the presenting problem is recorded as “anxiety with depression”.
- 7.7 On 10 April 2018, prior to the claimant’s contract of employment starting, the claimant completed a customer service assessment health questionnaire form. The claimant ticked “No” to questions relating to her ability to deal with customers in a calm way and to a question asking if the claimant had any disability health problem or illness that the respondent needed to consider when placing her. However, I place little reliance on this document as the claimant was seeking employment and may well not have flagged up her depression. There are, after all, entries in her GP notes for 11 and 13 April 2018 referring to anxiety with depression.
- 7.8 On 22 May 2018 the claimant went to her GP with the presenting problem being described as “stress at work”. The history is set out as follows:
- “Patient is having stress at work, working at Tesco’s – night shifts and issues are with the management, it is causing a lot of anxiety...”
- 7.9 In the examination section the following is recorded:
- “Well, systemically mentally.”
- 7.10 On 22 May 2018 the claimant presented a fit note citing “stress at work”.
- 7.11 On the claimant’s return to work a stress risk assessment was undertaken by the respondent on 30 May 2018. In particular, the claimant was asked if there was anything else at work or home that caused her to feel stressed or may have contributed to work related stress and her answer “no” is recorded.
- 7.12 On 3 September 2018 the claimant attended her GP. The initial presenting history is as follows:-

“Says two days ago for the first time had panic attack. Explained to describe her symptoms, she said, that she was walking fast (she works at Tesco) and she got SOB (shortness of breath) and had to breathe quickly and shallow. No palpitations ?? and rather slow HR (heart rate).”

- 7.13 Later on that day the claimant was seen by another doctor who records the presenting history as follows:-

“Very stressful job, at dot.com on Saturday was feeling v stressed and out of depth, had episode where she could feel her heartbeat very slow, room “felt dark” and felt she had to breathe deeply says has been feeling anxious for past few months, but also these symptoms

on Saturday quit job .... feels relieved now.”

- 7.14 Following that consultation the claimant’s GP wrote a “To whom it may concern” letter dated 3 September 2018 stating as follows:-

“This is a letter to confirm that the above patient came to see me today at the GP surgery with symptoms of breathlessness and episodes which may be related to anxiety and stress.”

- 7.15 On 25 March 2019 the claimant presented a fit note citing “Lower back pains and work related stress”. There is no corresponding entry in the GP records for that date which leads me to believe that some of those records are missing.

- 7.16 On 4 July 2019 Occupational Health reported on the claimant. This report states:-

“[The claimant] complained of work-related issues and I understand this was the reason for her recent absence... [The claimant] states that she was diagnosed with depression relating to personal issues, which are now resolved, and she is not on any medication for this. Although, she occasionally experiences low mood (especially during winter period) but presently, she states that her symptom is not troublesome.”

- 7.17 The Occupational Health practitioner who made that report is a specialist practitioner in Occupational Health.

- 7.18 On 21 August 2019 the claimant attended at her GP. The presenting problem is recorded as “anxiety states” but it would appear that I am missing the rest of that entry.

- 7.19 On 18 September 2019 the claimant presented a fit-note citing “back pain/stress”.

- 7.20 On 8 October 2019 the claimant attended at her GP with the presenting history being described as follows:-

“Patient been booked in for asthma review, but does not have any asthma diagnosis. Explained that she suffers from anxiety and this has caused her to have some heavy breathing.”

- 7.21 The problem is described as “anxiety with depression”
- 7.21 In addition I have the claimant’s impact statement. Having re-read her impact statement the claimant told me right at the outset that it was really dealing with her lumbar condition. During the course of her evidence the claimant accepted it did not adequately address any adverse effects resulting from her anxiety/stress. I have considered the impact statement carefully and it is true that it does refer to a number of issues such as insomnia and lack of motivation. However, in my judgment, it falls short of establishing that any anxiety or stress had a substantial adverse effect on the claimant’s ability to undertake day to day activities. The restriction on the claimant’s day to day activities, whether physical or in terms of motivation, in my judgment and I find, are restricted to those generated by the claimant’s lumbar disc degeneration.
- 7.22 The claimant referred to a massive decline in her mental health and indeed feeling suicidal. In my judgment, the medical evidence I have simply does not bear out these matters. The medical evidence that has been placed before me, such as it is, is limited. The GP notes appear to record six relevant visits at best between the start of her employment in April 2018 to December 2019. These are periodic visits citing stress at work or raising breathing issues. At a mid point in July 2019 occupational health reports occasional low mood which was not troublesome at that time.
- 7.23 The claimant has pointed to her absence record of 17% as being relevant to the assessment of whether she had a mental impairment. I accept that the fit note cited back pain as well as stress but that does not assist me in coming to a conclusion as to whether or not the claimant has a mental impairment.
- 7.24 In my judgment, the claimant does not have a mental impairment of stress/anxiety. In my judgment, the claimant’s evidence demonstrates that in this case and at that time she fell to the side whereby such stress as she experienced was an adverse reaction to her work situation which was perceived to be unpleasant.
- 7.25 Accordingly, I find that the claimant did not have a mental impairment of anxiety/stress at all relevant times.
- 7.26 Even if I were wrong about that, my review of the contemporaneous medical records demonstrates that any such condition did not have a substantial adverse effect on the claimant’s ability to undertake normal day to day activities. The restrictions recorded in the GP notes relate to breathlessness and being short of breath when walking quickly. In my judgment these are not substantial adverse effects. The impact statement essentially describes the impact of pain from her back and lacks any specific examples relating to the anxiety/stress.

---

**Employment Judge Alliott**

Date: 18/8/2021

Sent to the parties on:

26/8/2021

N Gotecha

For the Tribunal: