



EMPLOYMENT TRIBUNALS

Claimant: L Sewell

Respondent: Worcestershire Health & Care NHS Trust

Heard at: Birmingham **On:** 12 March 2020 and
5 June 2020 (In Chambers)

Before: Employment Judge Britton

Representation

Claimant: In Person

Respondent: Mrs G Harrad (Solicitor)

JUDGMENT

The Judgment of the Tribunal is that the Claimant was a disabled person within the meaning of the Equality Act 2010 at the material time.

Reasons

1. The Claimant presented a claim to the Tribunal on 4th June 2019 wherein she complained of unfair dismissal and disability discrimination contrary to Section 39 of the Equality Act 2010. For the purposes of her discrimination complaint, the Claimant pleaded that she had a mental impairment, namely, “anxiety and depression”.
2. By its Response entered on 18th July 2019, the Respondent did not concede that the Claimant was, at the material times, a “disabled person” within the meaning of Section 6(1) of the Equality Act 2010.
3. At the Preliminary Hearing on 14th October 2019, the Claimant confirmed that the impairment upon which she relies is “anxiety and depression”, and this Preliminary Hearing was listed to determine as a preliminary issue whether the Claimant had a disability.

4. The Claimant clarified at the beginning of the hearing that she considered that the relevant period was 11th September 2018 through to 12th April 2019.
5. The Claimant gave evidence as to the nature and effect of the mental impairment upon her ability to carry out normal day to day activities and with regards to her contention that the effect is both substantial and long term. I also had regard to an agreed Bundle of Documents consisting of 100 pages, which included a two page printout of her GP notes relating to the period 25th November 2018 to 20th February 2019. I have also had the benefit of reading the Claimant's Witness Statement dated 26th September 2019 and written submissions from both parties.

Findings of Fact

6. The Claimant was employed as a Senior Mental Health Practitioner. The Claimant was diagnosed as having a mental impairment, namely anxiety and depression, by her GP, Dr S Roberts, in April 2018, as confirmed by the report provided by Dr Roberts which is dated 10th October 2019. The report from Dr Roberts states that the Claimant has constant anxiety symptoms and symptoms of low mood. In response to the question regarding the affect that the Claimant's mental impairment has upon the Claimant's capacity to carry out normal day to day activities, Dr Roberts has stated that the Claimant has "persistent anxiety symptoms and low mood with poor motivation and reduced ability to focus". No information or opinion has been provided in relation to the adverse effect that the Claimant's symptoms have upon her ability to carry out any specific normal day to day activity and the extent of the adverse effect. The report from Dr Roberts appears to describe the symptoms of the Claimant's mental impairment and their effect upon her ability to carry out normal day to day activities as at the date of the report, ie. 10th October 2019.
7. The Claimant's referral to Occupational Health on 5th October 2017 coincided with her re-deployment and the difficulties experienced by the Claimant in working within her new working environment. Basically, as a result of a reorganisation the Claimant had been required to travel to Worcester, rather than be permanently based within Malvern, to which she had been accustomed. The situation had caused the Claimant some stress and she underwent a period of counselling with a Staff Counsellor prior to the Occupational Health referral.
8. When attending Occupational Health for her assessment, the Claimant made it clear that she was unhappy with her current working situation and Dr Basheer, the Consultant Occupational Physician was unable to detect any medical issues. In Dr Basheer's opinion, the problems were organisational, rather than medical, and the letter from Dr Basheer to the Respondent stated that "Occupational Health will not be able to recommend anything specific".
9. The Claimant's work related issues were not resolved to her satisfaction and she was absent from work due to ill health for a continuous period from 25th

April 2018. During this period of absence the Claimant provided a Statement of Fitness for Work that indicated that she had been advised to refrain from work due to “work related stress” on 25th April 2018, 18th May 2018, 29th May 2018, 14th June 2018, 12th July 2018, 19th July 2018, 12th September 2018, 10th October 2018 and 5th November 2018.

10. The Claimant attended various ill health meetings, starting with a meeting with Tim Keady on 20th June 2018. In advance of this meeting the Claimant prepared detailed notes listing her current presentation. That list referred to the following:- acute stress; heightened anxiety states and responses; sadness/depressive states; guilt; PTSD presentation; hair loss; panic attacks; extreme nerve issues – hyper-vigilant/unable to relax; nightmares; recurring traumatic and negative dreams; loss of restorative sleep and complete exhaustion/burnout. The Claimant also recorded in her notes that when she left work on 20th April 2018 she had felt broken, sick, overwhelmed, burnt out, unsupported, disenfranchised, stressed and highly anxious. At the meeting on 20th June 2018, the Claimant described the nature of her ill health and its effect on her ability to function within the context of the process by reference to her notes.
11. However, following that meeting the Claimant sent a letter to Barney Colgan dated 19th September 2018, which was coherent and well structured. On the face of it, it did not have the appearance of having been written by someone suffering with the effects detailed by the Claimant within her notes dated 19th June 2018. The Claimant had attended and participated in a scheduled meeting on 11th September 2018.
12. The Claimant attended an ill health meeting on 23rd October 2018, following which the Respondent made a further Occupational Health referral, on 26th October 2018. At the ill health meeting, the Claimant described feeling “overwhelmed” and explained that she had not felt well enough to look at emails. The Claimant informed the Respondent that she could not deal with work letters due to her mental health. The Claimant informed Mr Colgan that her GP was fully aware of her situation and supportive. However, the Claimant was not prepared to say whether she had further appointments planned with her GP. Although the Claimant participated in this meeting and discussed her work situation at length, she did explain to Mr Colgan that she did not feel that meetings were in her best interests. There were clearly a number of unresolved work issues troubling the Claimant that were summarized at the end of that meeting.
13. The Claimant was assessed again by Dr Basheer on 8th November 2018. At that point the Claimant had been absent from work due to illness for approximately 7 months due to work related stress. At her assessment with Dr Basheer, the Claimant stated that her work related stress symptoms had increased in severity since he had last seen her in November 2017, which she attributed to there being no clinical supervision in her role, poor administrative support and an increase in work load. The Claimant informed Dr Basheer on 8th November 2018 that although she had been seeing her GP, there had been no formal diagnosis of anxiety and depression and that she had not been receiving treatment or formal counselling.

14. The Claimant also informed Dr Basheer that she felt that the major cause of her stress and anxiety was work related issues arising out of the fact that notwithstanding there had been a number of meetings, there had been no resolution to her concerns and a position of “stalemate” existed.
15. The findings and opinion of Dr Basheer were set out in a letter dated 23rd November 2018. Dr Basheer stated that he had detected that the Claimant “had features of mild anxiety and depression”. His Report went on to state that in his opinion the main barrier to the Claimant’s return to work remained “organisational rather than medical”. The Report went on to state “After my assessment today, I felt that Occupational Health will not be able to offer any solutions for this situation. The issues are purely work related”. It went on “I do not feel that there is any value in writing to her GP because she has already described her history in detail to me and also the fact that she is not on any treatment such as medication or counselling.” Dr Basheer’s report concluded by stating “A further Occupational Health review is not going to be useful as we will not be able to offer any medical solutions in her case”.
16. On 26th November 2018 the Claimant again consulted her GP, Dr Roberts. On this occasion she indicated that she would consider taking Citalopram and she was provided with a prescription for this medication. The Statement of Fitness for Work issued following that consultation, which was dated 26th November 2018, advised that the Claimant should refrain from work due to “work induced stress”.
17. The Claimant sent a letter to Barney Colgan dated 8th December 2018. Within this letter she set out a detailed account of her symptoms, including the fact that she considered that her mental health had particularly deteriorated from 11th September 2018 onwards. The Claimant referred to her anxiety and depression and reiterated the feeling of being “overwhelmed”. Within this letter the Claimant also explained that she had ceased to engage with other things. The Claimant’s response was lengthy, well structured and set out her views with regards to various work related matters in a well structured and reasoned manner. Although on the face of it this would appear to be consistent with the Claimant’s symptoms as described by her, and confirmed by her GP, the Claimant made it clear within that letter that she found it daunting to respond to the correspondence that she had received and had taken “weeks” to compile two responses.
18. A further Statement of Fitness for Work was issued by Dr Roberts on 7th January 2019 and 24th January 2019. The Claimant informed Dr Roberts on 7th January 2019 that she had started taking Citalopram and on both occasions the Claimant was advised to remain absent from work due to “work induced stress”. Although the last of these “Fit Notes” was due to expire on 28th February 2019, the Claimant was in fact dismissed, due to capability, following a hearing on 30th January 2019. The notes that the Claimant prepared for the panel included how the Claimant’s condition had deteriorated and the fact that she was managing to participate in the process through the use of anti-depressants. The Claimant’s note also reiterated

her symptoms, in particular referencing her difficulties with “interactions”, travelling far from home, lack of motivation and her anxiety including panic attacks and depression. Indeed, the Claimant largely described the symptoms that she had set out within the notes that she made for the meeting with Mr Keady that are dated 19th June 2018.

19. None of the Statements of Fitness for Work that were issued by Dr Roberts during the period commencing 25th April 2018 referred to her diagnosis of “anxiety and depression”. However, Dr Roberts has provided a report dated 10th October 2019 wherein she has explained that she did in fact diagnose “anxiety and depression” on 25th April 2018 and, in anticipation of this hearing, Dr Roberts has provided further information by letter dated 15th February 2020. This letter states that Dr Roberts first saw the Claimant with regards to her mental health on 25th April 2018, but it does not expand upon the Claimant’s condition at that time, save that she felt it was appropriate for the Claimant to be signed off work. However, within this letter Dr Roberts states that in her opinion the Claimant has a mental impairment which has a substantial and “negative effect” on her ability to do normal day to day activities and that this has been continuous since 25th April 2018.
20. The Claimant’s Impact Statement describes the impact and effects of her mental impairment on her ability to carry out normal day to day activities and she states that she believes that these effects “have been visible throughout the entire time I have been ill to date”. I understand this to mean from April 2018 onwards. Within her Impact Statement the Claimant describes consistently low mood, being constantly and disproportionately tearful, lacking motivation and being constantly tired. The Claimant also describes being disengaged, avoiding social activities and having to work extremely hard to put on a “mask to appear normal”. The Claimant describes herself as “barely functional”. The Claimant’s Impact Statement describes having an urgent drive to avoid further stress that “essentially obliterates the possibility of me enjoying anything”. It describes her difficulties with recall, making decisions, processing information and concentrating. The Claimant’s Impact Statement also describes how she has found it much harder, due to the concentration and motivation required, to perform everyday activities, such as self care, housework, hygiene, cooking and cleaning, which she states are often neglected. The Claimant also states that she no longer takes pride in her appearance and is tired all the time. The Claimant’s Impact Statement describes “flash backs”, constant negative thoughts and feelings, and poor sleep.
21. When giving evidence the Claimant described herself as being “in crisis” at the point that she visited her GP in April 2018 and stated that from this point onwards she stopped socializing and found it difficult to take any pleasure from watching films at home or at the cinema due to the fact that she felt no longer able to concentrate or focus sufficiently. The Claimant also described losing interest and sufficient focus to be able to continue her art and craftwork hobbies after a time. The Claimant also explained when giving evidence that she had found it difficult getting out of bed, moving about, dealing with letters and things in general. She described wanting to remain

static, in a safe place, but felt all the time as though things were going around at a 100 miles per hour inside.

22. The Claimant gave evidence about feeling that she had reduced cognitive functionality. The Claimant stated that she sometimes is unable to think, that she forgets things and that her mind goes blank from time to time. The Claimant also described the fact that she had struggled to perform day to day tasks such as making meals or cups of tea, due to her lack of enthusiasm. She stated that there had been times when she couldn't be bothered to eat and that she no longer had the inclination to return voice messages or even answer her phone. Basically, the Claimant stated that she no longer wanted to do anything.
23. The Claimant also described symptoms of having negative thoughts and being self conscious. The Claimant explained that she was hyper-vigilant and anxious continuously right back to the point prior to going off sick in April 2018. She explained that her anxiety had caused her to have feelings that she was at risk of threat or harm. The Claimant stated that she was disproportionately alarmed by unexpected noises such as a dog barking or the sound of a vehicle horn.
24. However, the Claimant was able to correspond with the Respondent throughout. She sent various letters to Barney Colgan. At the capability hearing that was held on 30th January 2019, the Claimant relied upon a 12 page letter and participated in a lengthy meeting. The Claimant was also able to participate in the appeal hearing that was held in April 2019. Whilst off sick the Claimant sent two letters which set out in great detail her dissatisfaction with the Respondent and these letters were both lengthy and very detailed. However, I accept the Claimant's evidence that the letter dated 19th September 2018 took the Claimant 1-2 weeks to write and the letter dated 8th December 2018 took about a month for her to write, with the assistance of a third party and after taking many breaks.
25. The Claimant started work in March 2019, initially on a part time basis and then full time from April 2019. The Claimant did not work regularly in the shop environment, she spent some time in the background dealing with paperwork, ordering products, social media and the like. The shop is an organic food shop and the Claimant knows the owner very well. As a consequence, she was able to start working there in March 2019 only 3 days a week and even those days were not full days. The Claimant's primary role was as a cook in the café which she mostly did before the shop opened. In this role, the Claimant had minimal contact with customers and very limited risk of exposure to stressful situations.

The Law

26. In cases such as this, that do not involve deemed disabilities or excluded conditions, the question of whether an individual is disabled is to be answered

with reference to the statutory definition in Section 6(1) of the Equality Act 2010 (EQA 2010):

“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”.

27. The definition set out in Section 6 above, which is supplemented by provisions in Schedule 1 of the EQA 2010, raises four essential questions:-

- Does the person have a physical or mental impairment?
- Does that impairment have an adverse effect on their ability to carry out normal day to day activities?
- Is that effect substantial?
- Is that effect long term?

28. Although these questions overlap to a certain degree, when considering the question of disability, a Tribunal should ensure that each step is considered separately and sequentially (*Goodwin v Patent Office* [1999] IRLR 4 (EAT)).

29. The first limb of the EQA 2010 definition of disability requires the individual to have a “physical or mental impairment”. It is not in dispute that the Claimant has a mental impairment by reason of her “anxiety and depression”.

30. The impairment will only amount to a disability if it has a substantial adverse effect on the Claimant’s ability to carry out “normal day to day activities”. The EQA 2010 Guidance states:

“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).

31. The EQA 2010 states that “substantial” means “more than minor or trivial”. Section B1 of the EQA 2010 Guidance states:-

“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”.

32. In *Paterson v Commissioner of Police of the Metropolis* [2007] IRLR 763 the EAT held that “when assessing the effect, the comparison is not with the population at large...what is required is to compare the difference between the way in which the individual in fact carries out the activity in question and how he would carry it out if not impaired”.

33. The EAT gave further Guidance in *Aderemi v London & South Eastern Railway Limited* UK EAT / 0316/12 that the Employment Tribunal should focus on what the employee cannot do because of their impairment, rather than what they can still do, despite their impairment.

34. An impairment will be treated as having a substantial adverse effect on a persons ability to carry out normal day to day activities if:-

- Measures are being taken to treat it or correct it; and
- But for the measures, the impairment will be likely to have that effect.
(paragraph 5(1), Schedule 1, EQA 2010)

35. “Measures” expressly include medical treatment and in *Woodrup v London Borough of Southwark* [2003] IRLR 111, the Court of Appeal held that a Tribunal should assess how an impairment would affect the Claimant’s day to day activities if the medical treatment were stopped.

36. In *Tesco Stores Ltd v Tennant* [2019] 11 WLUK 730, the EAT confirmed that a disability must have long term effect at the time that the alleged acts of discrimination are committed. Therefore, if the Claimant’s condition has not lasted at least 12 months at the time of the alleged discriminatory act (or, if there is more than one act, at the time of each act), the Claimant will not meet the definition of disability unless they can show instead that, at the time of the alleged discriminatory act (or acts), their condition was likely to last 12 months or for the rest of their life. It is well established law, following *SCA Packaging Ltd v Boyle* [2009] UKHL 37, that “likely” means that something “could well happen”.

37. It is for the Claimant to demonstrate that she was a disabled person at the relevant time in accordance with the Equality Act 2010. The burden of showing disability rests with the Claimant.

Conclusion

38. I am satisfied that the Claimant was suffering from a mental impairment from April 2018 onwards, which included the relevant period, as identified by the Claimant as 11th September 2018 to 12th April 2019. The mental impairment was a mixture of a mental health condition with symptoms of anxiety, low mood, panic attacks and unshared perceptions, combined with a mental illness, namely depression.

39. Within the Occupational Health Report that was prepared on 27th November 2017, the opinion was given that the Claimant’s concerns were issues in the workplace and not medical reasons. Dr Basheer reiterated this view within his letter dated 23rd November 2018, but did acknowledge that the Claimant had been suffering with “mild anxiety and depression”. I have given careful consideration to the evidence from the Respondent’s Occupational Health Adviser and I have also had close regard to the Respondent’s Submissions in relation to the medicalisation of work problems. I have taken into account the principles in *J v DLA Piper UK LLP* UKEAT/0263/09 and *Rayner v Turning Point*

and Others UKEAT/0397/10. I have appreciated the distinction that needs to be drawn between symptoms of low mood and anxiety caused by clinical depression and those that are derived from “adverse life events”. I have considered the medical advice provided by the Claimant with great care as cautioned by the EAT in Herry v Dudley Metropolitan Council UKEAT/0100/16. However, whilst the Claimant clearly has suffered with symptoms that have been brought on by her work situation, this is not a case in which in all other respects she suffers no or little apparent adverse effect on her normal day to day activities.

40. Notwithstanding the fact that the Claimant has produced limited contemporaneous evidence in the form of GP notes, I am assisted greatly with regards to the nature of the impairment by the reports prepared by the Claimant’s GP dated 10th October 2019 and 15th February 2020. I prefer the Claimant’s GP’s evidence to that of the Respondent’s Occupational Health Adviser because the Claimant’s GP has the advantage of having treated the Claimant and directly observing her over a long period of time and is in a better position to form a conclusion than Dr Basheer who had seen the Claimant on two occasions, approximately 12 months apart.

41. I have reached the above conclusion notwithstanding the fact that the Fit Notes provided by the Claimant’s GP all stated work related stress. The Fit Notes did not describe the Claimant’s ill health as anxiety or depression. I accept, however, that the Claimant’s GP did in fact diagnose anxiety and depression in April 2018 as stated within her report dated 10th October 2019.

42. The Claimant’s GP’s reports dated 10th October 2019 and 15th February 2020 do not provide significant assistance with regards to the extent to which the Claimant’s symptoms may have had an adverse effect upon her ability to carry out normal day to day activities from the point at which it was first diagnosed in April 2018. However, I did find the Claimant an honest and truthful witness. I do not believe that she exaggerated her symptoms when giving evidence. I accept that the Claimant’s symptoms did have a substantial adverse effect on her ability to carry out day to day activities. In this sense, the effect was in my judgment more than minor or trivial. In circumstances such as in this case, where the Claimant had been diagnosed with anxiety and depression by her GP and her GP has advised her to refrain from work, that is in itself evidence of a substantial effect on day to day activities. I have taken into account the cumulative effect of the Claimant’s anxiety and depression. I accept, as indicated above, the Claimant’s evidence with regards to a whole range of symptoms that she has described, including a loss of motivation and energy which has either prevented or made it substantially more difficult for the Claimant to carry out a number of day to day activities, such as household tasks which are frequently left undone, or take much longer to complete than normal. When approaching this task, I have focused upon what the Claimant cannot do, rather than what she is able to do.

43. Having accepted the evidence from the Claimant’s GP that the Claimant was diagnosed with anxiety and depression in April 2018, and that she still did not consider her fit to return to work even in February 2020, and having

accepted the Claimant's description of the effects of her mental impairment upon her ability to perform normal day to day activities from that point onwards through to April 2019, I am satisfied that the Claimant's mental impairment had a substantial adverse effect on her ability to carry out normal day to day activities for at least 12 months.

44. In the alternative, and in any event, throughout the relevant period relied upon by the Claimant, 11th September 2018 to 12th April 2019, I would have found that the Claimant's mental impairment was likely to last for at least 12 months (in the sense that it "could well happen") because of the nature of the Claimant's mental impairment, the fact that her mental impairment and the fact that her symptoms had only improved slightly following the introduction of anti-depressant medication in December 2019.

45. For the reasons set out above, I find that the Claimant was a disabled person as defined by Section 6 of the Equality Act 2010 from April 2018 to 12th April 2019 and, beyond that date she remained a disabled person notwithstanding her limited attempt to return to work on a part time basis in March 2019.

Employment Judge Britton

Date : 9 June 2020

RESERVED JUDGMENT SENT TO THE PARTIES ON

10 June 2020

FOR THE TRIBUNAL OFFICE