



EMPLOYMENT TRIBUNALS

Claimant: Mr M Scanlon

Respondent: Mirus Wales

Heard at: Cardiff (in private;by video) **On:** 28th September 2022 &
10th October 2022

Before: Employment Judge Howden-Evans

Representation

Claimant: In person

Respondent: Mr Windross, Counsel

RESERVED JUDGMENT

Having heard evidence from the Claimant, on oath and having considered the bundle of documents and listened to submissions from both the Claimant and the Respondent's counsel, the employment judge's decision is, *at the relevant time, the Claimant did not have a disability by reason of his PTSD, but he did have a disability by reason of his anxiety, depression and ADHD.*

REASONS

1. **The Respondent accepts The Claimant has a disability as defined in section 6 of Equality Act 2010, by reason of The Claimant's ADHD.**
2. This preliminary hearing was to determine whether The Claimant had a disability as defined in section 6 of the Equality Act 2010, **by reason of anxiety, depression and/or PTSD.**
3. The points that I have to determine are:
 1. *Did The Claimant have a disability as defined in section 6 of the Equality Act 2010 (by reason of his anxiety, depression and/or PTSD) at the time of the events the claim is about?*
 - 1.1 *Did he have the mental impairments of anxiety, depression and/or PTSD?*

- 1.2 *Did it have a substantial adverse effect on his ability to carry out normal day-to-day activities?*
- 1.3 *If not, did The Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?*
- 1.4 *Would the impairment have had a substantial adverse effect on his ability to carry out normal day-to-day activities without the treatment or other measures?*
- 1.5 *Were the effects of the impairment long-term? The judge will decide:*
 - 1.5.1 *did they last at least 12 months, or were they likely to last at least 12 months?*
 - 1.5.2 *if not, were they likely to recur?*

Findings of Fact

4. The Claimant is an extremely intelligent and articulate gentleman. He displayed tremendous courage and strength of character in giving his evidence which often had to touch upon topics that were difficult for him to discuss. He is fascinated by the human mind and has previously successfully completed a degree in Psychology; it is hoped that his relatively recent diagnosis with ADHD (for which he is now receiving the correct medication) will enable him to continue his studies or pursue a new field of study - he is considering studying computer science, economics, or finance. He has much to offer the academic world and future employers.
5. The Claimant is now in his twenties. As a child, he experienced extensive abusive treatment from his father. This was physical and psychological abuse and extreme controlling behaviour. Understandably there is no reference to this in the Claimant's childhood medical notes; as the Claimant explained he could not tell his GP for fear of the repercussions. The Claimant is currently undergoing therapy treatment and I had the benefit of being able to read those medical notes, which support the Claimant's evidence of the events he has experienced.
6. The Claimant's teenage years were very difficult. From the age of 12 he started to use alcohol (and later, on rare occasions, drugs) to mask the pain he was experiencing as a result of his home situation and his mental health difficulties. At the age of 15 the Claimant was treated in hospital for an acute medical emergency having attempted suicide with alcohol and drugs. He was close to attempting suicide on three other occasions between the ages of 15 and 19 and self-harmed on occasions between the ages of 15 to 18.

7. Despite these overwhelming difficulties, the Claimant persevered and attained 12 GCSEs. During his A level years, his attendance was impacted by difficulties at home and the Claimant again turned to alcohol to cope. However, he successfully completed A levels in Economics Sociology and Psychology.
8. The Claimant progressed to higher education and studied psychology and counselling at a Welsh university. During these studies, his health took a turn for the worse and he again used alcohol as a means of coping. The Claimant was too unwell to complete this course and returned home. He underwent a detox programme and has successfully managed his alcohol consumption in recent years.
9. Having completed his detox treatment the Claimant started a degree at a different university. He attained a 2:1 degree in Psychology and went on to start a postgraduate Master of Philosophy with the same university. Unfortunately, his mental health deteriorated again and the Claimant was too unwell to complete this qualification.
10. Whilst studying his undergraduate course at university, in October 2017, at the age of 21, the Claimant started working for the Respondent. Initially he was working 4 or 5 hours per week but in later years this built up considerably to over 30 hours per week.
11. Between 1st May 2020 to 5th July 2020 the Claimant was unable to work for the Respondent because of stress related illness. The Claimant has been unable to work since November 2020 due to his health. As I will go on to discuss, the Claimant has a number of ongoing health conditions. In addition to having ADHD, the Claimant has anxiety, depression, PTSD and since November 2020 has been diagnosed as having a chronic pain condition.
12. The Claimant gave an excellent analogy to help others to understand his conditions – he explained his ADHD is like the hardware of a computer and the anxiety, depression, PTSD and chronic pain that he experiences is like the software, that also has an impact on the functioning of the computer itself.

ADHD

13. On 4th October 2021, The Claimant was diagnosed as having ADHD [p269]. The Respondent accepts that at all relevant times the Claimant has had a disability by reason of ADHD.
14. By February 2022, the Claimant's medication had been adjusted in light of his ADHD and in March 2022 the Claimant described the last two weeks as being "the best he had been" as a result of getting his medication adjusted for ADHD.

15. As explained by the Claimant, the impacts of his ADHD include the following:
 - a. It impacts on his organisational skills, his ability to start new tasks and complete tasks;
 - b. He experiences memory issues and may forget tasks or find it difficult to remember sequential tasks;
 - c. He can experience emotional regulation difficulty, and this may lead to outbursts of anger;
 - d. The Claimant may feel restless and need to pace;
 - e. The Claimant can be oversensitive to rejection; and
 - f. The Claimant can experience brain fog and difficulty holding conversation without zoning out.

Anxiety

16. In 2012, at the age of 18, the Claimant was diagnosed as having anxiety by his GP. In relation to the relevant time, the Respondent accepts the Claimant has a long-term condition of anxiety and depression but does not accept that it has a substantial adverse effect on the Claimant's normal day to day activities [p43]. In particular, the Respondent notes that the Claimant's only period of absence for stress related problem was 1st May 2020 to 5th July 2020 (prior to his sick leave starting in November 2020).
17. I note from the GP records that from the age of 18 the Claimant was prescribed Amitriptyline (which was later changed to a prescription for Duloxetine and Amitriptyline). I also note that the Claimant felt antidepressants were making his condition worse and so whilst antidepressants were being prescribed the Claimant was sometimes not taking them and was not seeking repeat prescriptions.
18. I note the Claimant's difficulty attending school during his A levels and again attending University, when at one point he felt unable to go out during the daytime.
19. In September 2021, Dr de Silva, Consultant Psychiatrist reports the Claimant suffers "mixed anxiety and depression" and that the Claimant's symptoms had been worse since 2020 and particularly bad since July 2021.
20. As explained by the Claimant, the impacts of his anxiety include the following:
 - a. difficulty going to sleep and staying asleep;
 - b. feeling lethargic;
 - c. feeling restless, irritable and frustrated;
 - d. cognitive issues affecting his way of thinking;
 - e. difficulty concentrating and memory recall fatigue; and
 - f. overwhelming feelings of worry causing issues with breathing such as hyperventilation.

Depression

21. 2012, at the age of 18, the Claimant was diagnosed as having depression by his GP. In relation to the relevant time, the Respondent accepts the Claimant has a long-term condition of anxiety and depression but does not accept that it has a substantial adverse effect on the Claimant's normal day to day activities [p43]. In particular, the Respondent notes that the Claimant's only period of absence for stress related problem was 1st May 2020 to 5th July 2020 (prior to his sick leave starting in November 2020).
22. I note from the Claimant's medical records,
- a. On 28th March 2011 the Claimant (aged 17) is reported as having "*depressed mood*" [p142]
 - b. In September 2011 the Claimant (aged 17) is reported as having "*low mood*" and is referred to the community mental health team [p145]
 - c. On 16th September 2011 the Claimant (aged 17) is treated at A&E and is described as "*intoxicated, feeling suicidal*" [p193] and "*feeling hopeless, looks very down, cannot concentrate, suicidal thoughts*" [p190]
 - d. On 9th July 2014 the Claimant (aged 20) is seen by the primary care mental health team. Dr Hill, Consultant Psychiatrist, notes the Claimant as having "*poor sleep, low mood, anhedonia [inability to feel pleasure] getting worse over last year or so*" and prescribes Mirtazapine and recommended Cognitive Behaviour Therapy (CBT) [p115]
 - e. On 5th March 2015 the Claimant (aged 21) is reported as having "*Symptoms of depression, long standing problems as per last consultation but says over the last few months been v low, poor concentration, poor motivation, anhedonia, social withdrawal, poor sleep, appetite often v poor for few days then will binge few days*" [p142]
 - f. On 28 April 2015, the Claimant's GP notes the Claimant has "*left university as said he couldn't keep up attendance due to depression – states had antidepressants in the past which gave him suicidal thoughts – has appt with mental health team 26th May – requested sick note and not able to hold down a job at the moment and prescribed a course of Citalopram (20mg)*" [p145]
 - g. On 24 August 2015 another sick note is issued for 1 month stating "*depression*" [p145]
23. In September 2021, Dr de Silva, Consultant Psychiatrist reports the Claimant suffers "mixed anxiety and depression" and that the Claimant's symptoms had been worse since 2020 and particularly bad since July 2021.

24. As explained by the Claimant, the impacts of his depression include the following:
- a. difficulty going to sleep and staying asleep;
 - b. feeling lethargic;
 - c. feeling irritable and frustrated;
 - d. difficulty performing tasks such as household chores;
 - e. difficulty with self care, such as washing and changing clothes
 - f. cognitive issues affecting his way of thinking;
 - g. inability to feel joy;
 - h. difficulty concentrating and memory recall fatigue.

PTSD

25. On 26th October 2021, having conducted a review with the Claimant on 20th October 2021, Dr de Silva, Consultant Psychiatrist diagnosed the Claimant as having PTSD and notes *“He reported that his mood has improved and he feels better and more able to manage his emotions. The dissociation he suffered from is less frequent. He gets about 8 hours sleep. However, he still remains anxious. He has flashbacks of past trauma”*.
26. The Respondent instructed Dr Hamilton, Consultant Clinical Psychologist, to consider whether the Claimant has a disability by reason of PTSD.
27. On 2nd March 22, during a video assessment with the Claimant, Dr Hamilton completed the following assessments:
- a. General Health Questionnaire (GHQ-28) which aids in identification of psychiatric conditions
 - b. Hospital Anxiety and Depression Scale (“HADS”) – detects adverse anxiety and depressive states
 - c. Impact of Events Scale (IES-R), to measure specific responses to trauma
28. In his first report (dated 21st March 2022), Dr Hamilton notes the psychometric test scores

“suggest both severe anxiety and depression. Whilst the evidence suggests a long history of anxiety and depression there was no evidence to suggest that [the Claimant] was exhibiting any severe mood difficulties at the time of the assessment”.

His score on the GHQ-28 test was *“extremely high and in my opinion a consequence of his ongoing ADHD difficulties which causes secondary problems with anxiety and depression. There was however no evidence of any severe depression present at the time of the assessment.”*

His IES-R scores were *“high and in my opinion they need to be treated with caution as there was no evidence of any active PTSD when discussing childhood difficulties and his suggested “reliving” of trauma. Indeed, there is*

little in his GP records in the years prior to leaving his role with [the Respondent] to suggest any notable post-traumatic injury.”

29. Dr Hamilton concluded the Claimant had a disability by reason of his ADHD. In relation to PTSD his findings were *“[The Claimant] also has a diagnosis of PTSD. Sufferers of post-traumatic stress disorder are protected by the Equality Act 2010 if their condition has a substantial and long-term effect on their ability to carry out normal day to day activities. In my opinion his PTSD does not have a substantial and long-term effect on his ability to carry out normal day to day activities.”*
30. In his second report (dated 16th June 2022) [p280], Dr Hamilton considered his opinion in light of therapy records for the period April 2021 to March 2022 (which had not been available to Dr Hamilton at the time of his first report). Dr Hamilton concluded *“I remain firm in my original opinions outlined in my report dated 21st of March 2022 in which I stated that “[the Claimant’s] presentation was not that of someone exhibiting a significant PTSD injury and he talked openly and without affect about his childhood problems”. This lack of affect, which is essential for a diagnosis of PTSD was also confirmed in his therapy records.”*
31. In his third report (dated 16th August 2022) [p317], Dr Hamilton considered the Claimant’s Supplementary Disability Impact Statement, and noted *“I remain of the firm opinion that his presenting problems and his historical problems are fuelled by his ADHD and not PTSD....In my opinion it is the ADHD and in particular the problems [the Claimant] has experienced from a young age with dealing with his emotions and relational problems which have caused significant problems for him throughout his teenage years. Many of these problems are highlighted in his comprehensive supplementary disability impact statement....This presentation however is not PTSD and in spite of Mr Scanlon being diagnosed with anxiety and depression by health care professionals throughout his teens, there was never any suggestion of PTSD.....In addition to the challenges outlined above, ADHD has also been found to have a profound effect on an individual’s personality. This in itself can create a myriad of problems and in my opinion is now likely to be underpinning [the Claimant’s] insistence on a history of PTSD....I am in no doubt as per my previous report that [the Claimant’s] ADHD profile has been evident from a young age and features heavily throughout his GP records”.*
32. As explained by the Claimant, the impacts of his PTSD include the following:
 - a. Difficulty managing hyperarousal
 - b. Difficulty with sleep
 - c. Difficulty concentrating
 - d. Irritability and outbursts of anger
 - e. He experiences aphantasia (the inability to create mental visual representations and lack of visual memory)
 - f. He experiences emotional numbing (difficulty feeling and expressing emotions.

33. The Claimant explained that from April 2020 he struggled to stop his fight or flight response and would be easily startled by sudden changes in environment (eg loud noise or sudden movements). He also struggled with emotional regulation which could lead to outbursts of anger.
34. The Claimant explained that he experiences flashbacks – both emotionally and somatically and this would be followed by periods of dissociation.
35. The employment judge notes and has carefully considered the different examples of occasions on which the Claimant believes his PTSD has had a substantial impact on him (as detailed in the Supplementary Disability Impact Statement [311]).
36. In the Claimant's therapy notes (2022) the Claimant is noted to meet the criteria for PTSD.

The Law

37. Section 6 of the Equality Act 2010 provides a person has a disability if they have a physical or mental impairment that has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.
38. Section 6 also provides that a reference to a person who has a disability includes a person who has had the disability.
39. Schedule 1 to the Equality Act 2010 explains that an impairment is "long-term" if it has lasted or is likely to last for at least 12 months or the rest of the life of the person affected. It also explains that if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.
40. In **SCA Packaging Ltd v Boyle** [2019] UKHL 37, the House of Lords explained that "*likely*" (as referred to in Schedule 1 Equality Act 2010) means "something that could well occur" as opposed to something that is more likely than not to happen.
41. Paragraph 5 of Schedule 1 to the Equality Act 2010 provides "*An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if— (a) measures are being taken to treat or correct it, and (b) but for that, it would be likely to have that effect. (2) "Measures" includes, in particular, medical treatment...*"
42. Following the Equality Act 2010, guidance has been issued – see Guidance on Matters to be Taken into Account in Determining Questions relating to the Definition of Disability (2011):

Paragraph B4 of that guidance explains "*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.”

Paragraph B9 of that guidance provides: “...*It is important to consider the things that a person cannot do or can only do with difficulty*”

43. **Cruickshank v VAW Motorcast Ltd** [2002] IRLR 24, EAT confirms I must answer these all questions at the date of the alleged acts of discrimination, ie during the period 7th July 2020 to 27th January 2021.
44. In **Sullivan v Bury Street Capital Ltd** [2021] EWCA Civ 1694, LJ Singh confirmed that when determining whether a person has a disability as defined in s6 Equality Act 2010, the employment judge must answer the following 4 questions:
 1. *Was there an impairment?*
 2. *What were its adverse effects?*
 3. *Were they more than minor or trivial?*
 4. *Was there a real possibility that they would continue for more than 12 months or that they would recur?*
45. LJ Singh also emphasised that these were questions for the employment tribunal or employment judge to determine; although we may be assisted by medical evidence, we are not bound by any opinion expressed by a medical practitioner as parliament has made it clear that the assessment of whether or not a Claimant has a disability is for the employment tribunal to determine.

Conclusions

46. I accept Dr Hamilton’s expert opinion that at all relevant times the Claimant has had ADHD and this amounts to a disability for the purposes of s6 Equality Act 2010.

Did the Claimant have the mental impairments of anxiety, depression and/or PTSD?

47. I also accept that since the Claimant’s mid-teens he has also had mental impairments of anxiety, depression, and PTSD which have coexisted with the Claimant’s ADHD. The Claimant has experienced symptoms and impairments from each of these conditions since his mid-teens.

Did anxiety have a substantial adverse effect on the Claimant’s ability to carry out normal day-to-day activities?

48. Having considered the Claimant’s disability impact statement and medical records, anxiety has had a substantial adverse effect upon the Claimant’s ability to carry out normal day to day activities at different times prior to the date of the alleged acts of discrimination (7th July 2020 to 27th January 2021). During his A levels he had difficulty attending school and he

subsequently had difficulty attending his first university. At university he was noted to have had difficulty going out during the daytime as a result of anxiety. In May 2020 he was signed unfit to work for stress related problems.

49. The Claimant has explained that when his anxiety is at its worse it causes him difficulty sleeping and can affect his breathing. I accept that these effects combined with an inability to go outside do amount to impairments that are more than minor or trivial.

Were these substantial adverse effects (from anxiety) long term? Was there a real possibility that they would continue for more than 12 months or that they would recur?

50. By the date of the alleged acts of discrimination (7th July 2020 onwards) the Claimant had already experienced at least three bouts of anxiety that had impacted on his ability to attend school (in 2012) , university (in 2015) and work (in May to July 2020). I am satisfied that by July 2020 there was a real possibility that the substantial impairment that the Claimant had previously experienced with anxiety would recur. I am satisfied that by that date (July 2020) the substantial adverse effects that the claimant had experienced from anxiety were long term.

Did depression have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?

51. Having considered the Claimant's disability impact statement and medical records, depression has had a substantial adverse effect upon the Claimant's ability to carry out normal day to day activities at different times prior to the date of the alleged acts of discrimination (7th July 2020 to 27th January 2021). The medical records set out in paragraph 22 of this Judgment demonstrate that on a number of occasions the Claimant has had to seek help from his GP as he has been unable to feel any pleasure (2014 & 2015), unable to sleep, had difficulty concentrating and eating (2015), not well enough to work (2015) (2020) as a result of depression.
52. I accept that these effects (from depression) do amount to impairments that are more than minor or trivial.

Were these substantial adverse effects (from depression) long term? Was there a real possibility that they would continue for more than 12 months or that they would recur?

53. By the date of the alleged acts of discrimination (7th July 2020 onwards) the medical records indicate the Claimant had experienced at least 5 bouts of low mood/ depression that required medical treatment (2011 to 2015). I am satisfied that by July 2020 there was a real possibility that the substantial impairment that the Claimant had previously experienced with depression would recur. I am satisfied that by that date (July 2020) the substantial adverse effects that the claimant had experienced from depression were long term.

54. The Respondent has submitted anxiety and depression have had little impact on the Claimant's ability to study and achieve academically; I disagree. On two occasions the claimant has been too unwell (as a result of anxiety and depression) to complete higher education qualifications.
55. As an aside I note Dr Hamilton's expert opinion that the root cause of the Claimant's impairment is his ADHD; I accept the root cause may be ADHD but that does not prevent him from also having an additional significant impairment because of anxiety and depression. Dr Hamilton notes the Claimant has a long history of illness with anxiety and depression and I find that at times his impairment with anxiety and depression has been so acute and so significant that they amount to a disability for the purposes of s6 Equality Act 2010 in their own right.

Did PTSD have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?

56. I note the Claimant has a diagnosis of PTSD and I accept that he is likely to have had PTSD since his mid teens. I also accept that he was unlikely to seek help for PTSD at a younger age because of his father's reaction. However, if the PTSD had been having a substantial adverse effect on his ability to perform normal day to day activities he would have had to seek help (just as he has done in 2021). In light of Dr Hamilton's expert opinion, I accept that by July 2020, the Claimant's PTSD had not yet had a substantial adverse effect on his ability to perform normal day to day activities; I accept the substantial impairments he had experienced up until that date had been as a result of his ADHD, depression and/or anxiety – they were not as a result of PTSD.
57. I have to look at the situation in 2020 (the time of the alleged acts of discrimination); if I were determining whether the Claimant now has a disability by reason of PTSD, the answer might well be different.
58. At the relevant time I am satisfied that the claimant did have a disability by reason of his ADHD, depression and anxiety for the purposes of the Equality Act 2010.

Employment Judge Howden-Evans
Date – 11 November 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 14 November 2022

FOR EMPLOYMENT TRIBUNALS Mr N Roche